No. 16-1094	
Title:	Republic of Sudan, Petitioner v. Rick Harrison, et al.
Docketed:	March 10, 2017
Lower Ct:	United States Court of Appeals for the Second Circuit
Case Numbers:	(14-121-cv)
Decision Date:	September 23, 2015
Rehearing Denied:	December 9, 2016
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Mar 09 2017	Petition for a writ of certiorari filed. (Response due April 10, 2017)
Apr 10 2017	Brief amicus curiae of United Arab Emirates filed.
Apr 10 2017	Brief amicus curiae of Kingdom of Saudi Arabia filed.
Apr 10 2017	Brief amici curiae of International Law Professors filed.
Apr 10 2017	Waiver of right of respondents Rick Harrison, et al. to respond filed.
Apr 10 2017	Brief amicus curiae of Government of National Accord, State of Libya filed.
Apr 13 2017	Supplemental brief of petitioner Republic of Sudan filed.
Apr 19 2017	DISTRIBUTED for Conference of May 11, 2017.
Apr 26 2017	Response Requested. (Due May 26, 2017)
May 24 2017	Order extending time to file response to petition to and including June 26, 2017.
Jun 26 2017	Brief of respondents Rick Harrison, et al. in opposition filed.

Jul 12 2017	DISTRIBUTED for Conference of September 25, 2017.
Jul 13 2017	Reply of petitioner Republic of Sudan filed. (Distributed)
Oct 02 2017	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Jan 30 2018	Second supplemental brief of petitioner Republic of Sudan filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 09 2018	Supplemental brief of respondents Rick Harrison, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
May 22 2018	Brief amicus curiae of United States filed. **Main Document** **Certificate of Word Count**
May 29 2018	DISTRIBUTED for Conference of 6/14/2018.
Jun 18 2018	DISTRIBUTED for Conference of 6/21/2018.
Jun 25 2018	Petition GRANTED.
Jun 28 2018	Motion for an extension of time to file the briefs on the merits filed. **Main Document**
Jul 03 2018	Motion to extend the time to file the briefs on the merits granted. The time to file the joint appendix and petitioner's brief on the merits is extended to and including and August 15, 2018. The time to file respondents' brief on the merits is extended to and including September 18, 2018.
Aug 10 2018	Blanket Consent filed by Respondents, Rick Harrison, et al.. **Blanket Consent**
Aug 10 2018	Blanket Consent filed by Petitioner, Republic of Sudan **Blanket Consent**
Aug 15 2018	Joint appendix filed. (Statement of costs received.) (To be reprinted.)
Aug 15 2018	Brief of petitioner Republic of Sudan filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 15 2018	Joint appendix filed. (Reprinted joint appendix submitted - September 7, 2018.) **Main Document** **Proof of Service**

Aug 20 2018	SET FOR ARGUMENT on Wednesday, November 7, 2018
Aug 21 2018	Brief amicus curiae of Government of National Accord, State of Libya filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 22 2018	Brief amicus curiae of Kingdom of Saudi Arabia filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 22 2018	Brief amicus curiae of United States filed. **Main Document** **Certificate of Word Count**
Aug 22 2018	Brief amici curiae of International Law Professors filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 10 2018	Record requested from the U.S.C.A. 2nd Circuit.
Sep 11 2018	Record received from the U.S.C.A. 2nd Circuit. The record is electronic and complete.
Sep 12 2018	CIRCULATED
Sep 17 2018	Record received from the U.S.D. C. Southern Dist. of New York. The record SEALED. (1 - Box)
Sep 18 2018	Brief of respondents Rick Harrison, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 24 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. **Proof of Service** **Main Document**
Sep 25 2018	Brief amicus curiae of Veterans of Foreign Wars of the United States filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 25 2018	Brief amici curiae of Former U.S. Counterterrorism Officials, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 09 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Kavanaugh took no part in the consideration or decision of this motion.
Oct 18 2018	Reply of petitioner Republic of Sudan filed. (Distributed)

	Main Document	Certificate of Word Count	Proof of Service
Nov 02 2018	Letter from respondents filed. (Distributed)		
Nov 07 2018	Argued. For petitioner: Christopher M. Curran, Washington, D. C.; and Erica Ross, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: Kannon K. Shanmugam, Washington, D. C.		

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RECORD AND BRIEFS

16-1094

No. 16-___

FILED
MAR - 9 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

REPUBLIC OF SUDAN,

Petitioner,

v.

RICK HARRISON, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 9, 2017

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QUESTION PRESENTED

Whether the Second Circuit erred by holding — in direct conflict with the D.C., Fifth, and Seventh Circuits and in the face of an amicus brief from the United States — that plaintiffs suing a foreign state under the Foreign Sovereign Immunities Act may serve the foreign state under 28 U.S.C § 1608(a)(3) by mail addressed and dispatched to the head of the foreign state's ministry of foreign affairs "via" or in "care of" the foreign state's diplomatic mission in the United States, despite U.S. obligations under the Vienna Convention on Diplomatic Relations to preserve mission inviolability.

PARTIES TO THE PROCEEDING

The Republic of the Sudan, petitioner on review, was the defendant-appellant below.

The following individuals, respondents on review, were the plaintiffs-appellees below: Rick Harrison, John Buckley III, Margaret Lopez, Andy Lopez, Keith Lorensen, Lisa Lorensen, Edward Love, Robert McTureous, David Morales, Gina Morris, Martin Songer Jr., Shelly Songer, Jeremy Stewart, Kesha Stidham, Aaron Toney, Eric Williams, Carl Wingate, and Tracey Smith as personal representative of the Estate of Rubin Smith.

Mashreqbank, BNP Paribas, National Bank of Egypt, and Crédit Agricole Corporate and Investment Bank, respondents on review, were respondents below.

The following entities, respondents on review, were defendants below. Pursuant to Rule 12.6 of this Court, Sudan does not believe that these entities have an interest in the outcome of this Petition: Advanced Chemical Works, AKA Advanced Commercial and Chemical Works Company Limited, AKA Advanced Training and Chemical Works Company Limited; Accounts & Electronics Equipments, AKA Accounts and Electronics Equipments; Agricultural Bank of Sudan; Alaktan Cotton Trading Company, AKA Alaktan Trading Company; Advanced Commercial and Chemical Works Company Limited, AKA Advanced Chemical Works, AKA Advanced Trading and Chemical Works Company Limited; Advanced Mining Works Company Limited; Advanced Petroleum Company, AKA APCO; African Oil Corporation; Advanced Engineering

Works; Advanced Trading and Chemical Works Company Limited, AKA Advanced Commercial and Chemical Works Company Limited, AKA Advanced Chemical Works; Al Sunut Development Company, AKA Alsunut Development Company; African Drilling Company; Al Pharakim, AKA Alfarachem Company Limited, AKA Alfarachem Pharmaceuticals Industries Limited, AKA Alfarakim; Alaktan Trading Company, AKA Alaktan Cotton Trading Company; Alfarachem Company Limited, AKA Al Pharakim, AKA Alfarachem Pharmaceuticals Industries Limited, AKA Alfarakim; Alfarakim, AKA Al Pharakim, AKA Alfarachem Pharmaceuticals Industries Limited, AKA Alfarachem Company Limited; Alfarachem Pharmaceuticals Industries Limited, AKA Al Pharakim, AKA Alfarakim, AKA Alfarachem Company Limited; Alsunut Development Company, AKA Al Sunut Development Company; APCO, AKA Advanced Petroleum Company; Amin El Gezai Company, AKA El Amin El Gezai Company; Arab Cement Company; Arab Sudanese Blue Nile Agricultural Company; Assalaya Sugar Company Limited; Arab Sudanese Seed Company; Arab Sudanese Vegetable Oil Company; Atbara Cement Company Limited; Automobile Corporation; Babanousa Milk Products Factory; Bank of Khartoum; Bashaier; Blue Nile Brewery; Blue Nile Packing Corporation; Central Electricity and Water Corporation, AKA Public Electricity and Water Corporation; Building Materials and refractories Corporation; Coptrade Company Limited, Pharmaceutical and Chemical Division; Central Bureau of Statistics of the Republic of Sudan; El Amin El Gezai Company, AKA Amin El Gezai Company; Coptrade Eng and Automobile Services Co

Ltd., AKA Kordofan Automobile Company; Duty Free Shops Corporation; El Nilein Bank, El Nilein Industrial Development Bank (Sudan), AKA El Nilein Industrial Development Bank Group, AKA Nilein Industrial Development Bank (Sudan); El Gezira Automobile Company; El Nilein Industrial Development Bank Group, AKA Industrial Bank of Sudan; Engineering Equipment Company; El Nilein Industrial Development Bank (Sudan), AKA El Nilein Bank, AKA El Nilein Industrial Development Bank Group, AKA Nilein Industrial Development Bank (Sudan); El Nilein Industrial Development Bank Group, AKA El Nilein Bank, AKA Nilein Industrial Development Bank (Sudan), AKA El Nilein Industrial Development Bank (Sudan); El Taka Automobile Company, AKA Taka Automobile Company; Emirates and Sudan Investments Company Limited; Engineering Equipment Corporation; Exploration and production Authority, (Sudan); Farmers Bank for Investment & Rural Development, AKA Farmers Bank for Investment and Rural Development, AKA Farmers Commercial Bank, Sudan Commercial Bank; Sudan Commercial Bank; Farmers Bank for Investment and Rural Development, AKA Farmers Commercial Bank; Farmers Bank for Investment & Rural Development; Farmers Commercial Bank, AKA Farmers Bank for Investment and Rural Development, AKA Sudan Commercial Bank, AKA Farmers Bank for Investment & Rural Development; Friendship Spinning Factory; Food Industries Corporation; Forests National Corporation; Gezira Tannery; Gezira Automobile Company, AKA El Gezira Automobile Company; Gezira Scheme, AKA Sudan Gezira Board; Gezira Trade and Services Company

Limited, AKA Gezira Trade & Services Company Limited; Gezira Trade & Services Company Limited, AKA Gezira Trade and Services Company Limited; Giad Automotive Company, AKA Giad Automotive Industry Company Limited, AKA Giad Cars & Heavy Trucks Company, Giad Cars and Heavy Trucks Company, Giad Automotive and Truck, AKA Giad Auto, AKA Giad Automotive; Giad Automotive and Truck, AKA Giad Automotive Company, AKA Giad Automotive Industry Company Limited, AKA Giad Cars & Heavy Trucks Company, AKA Giad Cars and Heavy Trucks Company; Giad Automotive Industry Company Limited, AKA Giad Automotive Company, AKA Giad Cars & Heavy Trucks Company, AKA Giad Cars and Heavy Trucks Company, AKA Giad Automotive and Truck; Giad Cars & Heavy Trucks Company, AKA Giad Automotive Company, AKA Giad Automotive Industry Company Limited, AKA Giad Cars and Heavy Trucks Company, AKA Giad Automotive and Truck, AKA Giad Automotive Company, AKA Giad Automotive Industry Company Limited, AKA Giad Cars and Heavy Trucks Company, AKA Giad Automotive and Truck; Giad Industrial Group, AKA Sudan Master Tech, AKA Sudan Master Technology, AKA Giad Industrial City; Gineid Sugar Factory; Giad Cars and Heavy Trucks Company, AKA Giad Automotive Company, AKA Giad Automotive Industry Company Limited, AKA Giad Cars & Heavy Trucks Company, AKA Giad Automotive and Truck; Giad Motor Industry Company Limited; Giad Industrial City, AKA Giad Industrial Group, AKA Sudan Master Tech, AKA Sudan Master Technology; Giad Motor Company, AKA Giad Motor Industry Company Limited; Greater Nile Petroleum Operating Company Limited, AKA

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(Sudan), AKA El Nilein Industrial Development Bank Group; Plastic Sacks Factory, AKA Sacks Factory; Northwest Sennar Sugar Factory; Port Sudan Edible Oils Storage Corporation; Oil Corporation; Port Sudan Cotton and Trade Company, AKA Port Sudan Cotton Company; PetroHelp Petroleum Company Limited; Port Sudan Duty Free Shop; Petroleum General Administration; Posts and Telegraphs Public Corporation, AKA Posts & Telegraphs Corp.; Port Sudan Cotton Company, AKA Port Sudan Cotton and Trade Company; Rabak Oil Mill; Port Sudan Refinery Limited; Public Corporation for Irrigation and Excavation; Port Sudan Spinning Factory; Public Corporation for Building and Construction; Rainbow Factories; Public Corporation for Oil Products and Pipelines; Public Electricity and Water Corporation, Central Electricity and Water Corporation; Rea Sweet Factory; Ram Energy Company Limited; Red Sea Hills Minerals Company; Red Sea Stevedoring; Sacks Factory, AKA Plastic Sacks Factory; Refrigeration and Engineering Import Company; SFZ, AKA Sudanese Free Zones and Markets Company; Roads and Bridges Public Corporation; Sennar Sugar Company Limited; Sheikan Insurance and Reinsurance Company Limited, AKA Sheikan Insurance Company; Sheriek Mica Project, AKA Shereik Mica Mines Company; Sheikan Insurance Company, AKA Sheikan Insurance and Reinsurance Company Limited; Shereik Mica Mines Company, AKA Sheriek Mica Project; SRC, AKA Sudan Railways Corporation; Silos and Storage Corporation; SRDC, AKA Sudan Rural Development Company Limited; Spinning and Weaving Corporation; State Trading Company, AKA State Trading Corporation;

Sudan Air, AKA Sudan Airways, AKA Sudan Airways Co. Ltd.; State Corporation for Cinema; Sudan Commercial Bank, FKA Farmers Bank for Investment & Rural Development, AKA Farmers Bank for Investment and Rural Development, AKA Farmers Commercial Bank; State Trading Corporation, AKA State Trading Company; Sudan Airways, AKA Sudan Airways Co. Ltd., AKA Sudan Air; Sudan Exhibition and Fairs Corporation; Sudan Advanced Railways; Sudan Cotton Company Limited; Sudan Development Corporation; Sudan Gezira Board, AKA Gezira Scheme; Sudan Master Tech, AKA Giad Industrial City, AKA Giad Industrial Group, AKA Sudan Master Technology; Sudan Master Technology, AKA Giad Industrial City, AKA Giad Industrial Group, AKA Sudan Master Tech; Sudan National Broadcasting Corporation, AKA Sudan Radio & TV Corp., AKA Sudan Radio and TV Corp., AKA Sudan T.V. Corporation; Sudan Oil Corporation; Sudan National Information Center; Sudan Olympic Committee; Sudan National Petroleum Company, AKA Sudan Petroleum Company Limited, AKA Sudapet, AKA Sudapet Ltd.; Sudan Oil Seeds Company Limited; Sudan Petroleum Company Limited, AKA Sudapet, AKA Sudapet Ltd., AKA Sudan National Petroleum Company; Sudan-Ren Chemicals &Fertilizers Ltd.; Sudan Rural Development Company Limited; Sudan Radio & TV Corp., AKA Sudan National Broadcasting Corporation, AKA Sudan Radio and TV Corp., AKA Sudan T.V. Corporation; Sudan Soap Corporation; Sudan Radio and TV Corp., AKA Sudan National Broadcasting Corporation, AKA Sudan T.V. Corporation, AKA Sudan Radio & TV Corp.; Sudan Railways Corporation, AKA SRC; Sudan Shipping

Line, AKA Sudan Shipping; Sudan T.V. Corporation, AKA Sudan National Broadcasting Corporation, AKA Sudan Radio and TV Corp., AKA Sudan Radio & TV Corp.; Sudan Tea Company, Ltd.; Sudan Telecom, AKA Sudan Telecom Group, AKA Sudatel Telecom Group, AKA Sudatel; Sudan Telecom Group, AKA Sudan Telecom, AKA Sudatel Telecom Group, AKA Sudatel; Sudan Telecommunications Company Limited, AKA Sudatel; Sudatel Investments; Sudatel Telecom Group, AKA Sudatel, AKA Sudan Telecom Group; Sudatel, AKA Sudan Telecom, AKA Sudatel Telecom Group, AKA Sudan Telecom Group; Sudanese Estates Bank; Sudan Warehousing Company; Sudanese Company for Building and Construction Limited; Sudanese Free Zones and Markets Company, AKA SFZ; Sudanese International Tourism Company; Sudanese Real Estate Services Company; Sudanese Mining Corporation; Sudanese Petroleum Corporation; Sudanese Sugar Company, AKA Sudanese Sugar Production Company Limited; Sudanese Savings Bank; Sudanese Standards & Meterology Organization; Sudanese Sugar Production Company Limited, AKA Sudanese Sugar Company; Sudapet Ltd., AKA Sudan Petroleum Company Limited, AKA Sudan National Petroleum Company, AKA Sudapet; Sudapet, AKA Sudan Petroleum Company Limited, AKA Sudan National Petroleum Company, AKA Sudapet Ltd.; Sudatel, AKA Sudan Telecommunications Company Limited; Taheer Perfumery Corporation; Sugar and Distilling Corporation, AKA Sugar and Distilling Industry Corporation; Sugar and Distilling Industry Corporation, AKA Sugar and Distilling Corporation; Taka Automobile Company, AKA El Taka Automobile

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Appendix I: Briefs of the United States

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Petitioner the Republic of the Sudan, a foreign state within the meaning of 28 U.S.C. § 1603, respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Second Circuit (App. 1a-21a) is reported at 802 F.3d 399. The Second Circuit's denial of panel rehearing (App. 92a-113a) is reported at 838 F.3d 86. The Second Circuit's denial of rehearing en banc is unreported but reproduced at App. 114a-115a.

The turnover orders entered by the U.S. District Court for the Southern District of New York are unreported but reproduced at App. 76a-91a.

The default judgment entered against Sudan by the U.S. District Court for the District of Columbia (App. 22a-75a) is reported at 882 F. Supp. 2d 23.

JURISDICTION

The Second Circuit entered judgment on September 23, 2015. Sudan's timely petition for panel rehearing was denied on September 22, 2016. Sudan's timely petition for rehearing en banc was denied on December 9, 2016.

This Court has jurisdiction to review the Second Circuit's decision under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The relevant provisions of the United States Code and the Vienna Convention on Diplomatic Relations are set forth in Appendix G.

STATEMENT

Numerous cases are filed against foreign states in U.S. courts each year. To initiate these cases, private plaintiffs must serve process on the foreign state pursuant to the prescribed methods of the Foreign Sovereign Immunities Act (FSIA). If the parties do not have an agreement for service of process and the foreign state is not a party to an applicable treaty on service, plaintiffs must serve the state by sending specified documents by any form of mail "addressed and dispatched . . . to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. § 1608(a)(3).

The interpretation of § 1608(a)(3) accepted by the D.C., Fifth, and Seventh Circuits — and urged repeatedly by the United States, including in this case — is that process must be sent by mail to the head of the ministry of foreign affairs *directly*, and may not be served on or transmitted through the foreign state's embassy in the United States or through some other intermediary. *See Barot v. Embassy of the Republic of Zambia*, 785 F.3d 26, 29-30 (D.C. Cir. 2015); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1150 (1995); *Magness v. Russian Fed'n*, 247 F.3d 609, 611-13 (5th Cir. 2001), *cert. denied*, 534 U.S. 892 (2001); *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 253 (7th Cir. 1983); *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 748-49 (7th Cir. 2007), *cert. denied*, 552 U.S. 1231 (2008). In the Panel Opinion below, however, the Second Circuit departed from that sound interpretation and held that service is

effective under § 1608(a)(3) if the package is addressed and sent to the head of the ministry "via" or in "care of" the foreign state's embassy in the United States.

The consequences of this departure are substantial. First, the circuits are now split on an issue that is likely to arise in potentially dozens of cases each year. Furthermore, the Second Circuit's misreading of the FSIA contravenes Article 22 of the Vienna Convention on Diplomatic Relations, thus placing the United States in violation of its treaty obligations and threatening U.S. interests abroad. The United States informed the Second Circuit that allowing service via a foreign state's embassy was contrary to the Vienna Convention, but the Second Circuit rejected that view. *Cf. Abbott v. Abbott*, 560 U.S. 1, 15 (2010) (stating it is "well settled" that the Executive's treaty interpretation is "entitled to great weight"); *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982) (noting that U.S. courts must defer to the interpretation of the United States on its treaty obligations "absent extraordinarily strong evidence").

Article 22 of the Vienna Convention provides that "the premises of the mission shall be inviolable." Vienna Convention on Diplomatic Relations art. 22, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. Under U.S. and international law, this Article prohibits service of process on a sovereign's embassy, consulate, and diplomatic officers. *See, e.g., Autotech Techs.*, 499 F.3d at 748-49 (holding "service through an embassy is expressly banned both by an international treaty to which the United States is a

party and by U.S. statutory law"); James Crawford, *Brownlie's Principles of Public International Law* 403 (8th ed. 2012) ("It follows from Article 22 that writs cannot be served, even by post, within the premises of a mission but only through the local Ministry for Foreign Affairs.").

The United States has repeatedly stated that an Article 22 violation occurs regardless of whether service is "on" or "through" the diplomatic mission. *See, e.g.*, Brief for United States as Amicus Curiae at 5, *Harrison v. Republic of Sudan*, No. 14-121 (2d Cir. Nov. 6, 2015), ECF No. 101 (hereinafter "U.S. Br., *Harrison*") (App. 143a-144a); Brief for United States as Amicus Curiae at 17-18, *Kumar v. Republic of Sudan*, No. 16-2267 (4th Cir. Feb. 7, 2017) (App. 168a-169a). In either case, the plaintiffs are effectively requiring the mission to act as the foreign state's agent for service of process.

If the Second Circuit's decision stands, in contrast to the decisions of the D.C., Fifth, and Seventh Circuits, numerous plaintiffs undoubtedly will elect to serve foreign state defendants at their U.S. embassies and consulates in violation of the Vienna Convention — as they did in the case below and more recently in other cases. *See, e.g.*, Letter at 2, *Park v. Embassy of Indonesia*, No. 1:16-cv-6652 (E.D.N.Y. Feb. 13, 2017), ECF No. 7 (mailing service documents to Indonesia's embassy in Washington, D.C.); Proof of Service Ex. A at 1, *Hmong I v. Lao People's Democratic Republic*, No. 2:15-cv-2349 (E.D. Cal. Dec. 28, 2015), ECF No. 9 (delivering service documents to Laos through its embassy and ambassador in Washington, D.C.); *see also* Order at 2, *Pereira v.*

Consulate Gen. of Brazil in N.Y., No. 1:15-cv-2593 (S.D.N.Y. Dec. 29, 2015), ECF No. 15 (citing Panel Opinion and ordering plaintiff to move the clerk for service upon Brazilian consulate in New York). Moreover, plaintiffs likely will forum shop to take advantage of the easier service procedure adopted by the Second Circuit, thus avoiding the D.C. Circuit despite Congress' prescription of the District of Columbia as the default venue for suits against foreign states. *See* 28 U.S.C. § 1391(f).

Mailing documents to an embassy or consulate in the United States is objectively simpler for U.S. litigation plaintiffs than mailing to an often unfamiliar address in a foreign country. And such a domestic mailing is also plainly easier, faster, and less expensive than deploying the State Department's services through diplomatic channels under § 1608(a)(4). But convenience is not cause to ignore Congress' plain intent that § 1608(a)(3) be interpreted consistent with U.S. treaty obligations in respect of foreign sovereignty.

Significantly, as the United States has explained, the Second Circuit's holding threatens U.S. interests abroad by exposing the United States to reciprocal treatment in foreign courts. Presently, the United States "routinely objects to attempts by foreign courts and litigants to serve the U.S. government by direct delivery to an American embassy." U.S. Br., *Harrison*, at 1 (App. 140a). If the Second Circuit's ruling stands, the United States will face difficulty trying to argue in similar situations throughout the world that it has not been served properly.

In enacting the service provisions of the FSIA, Congress was aware of the potential conflict with the Vienna Convention, and it purposely removed from earlier drafts language authorizing service on an embassy or consulate. The Second Circuit, however, misread the text, context, and legislative history of § 1608(a), thereby allowing an erroneous and substantial default judgment of over $300 million to stand against a foreign state.

This Court should review this case now, not only to resolve the circuit split, but also because this case raises more than mere technical service-of-process issues. It implicates congressional intent in a delicate area of foreign relations, serious questions of foreign sovereignty, binding U.S. treaty obligations, and important U.S. interests abroad.

A. Statutory Framework

Under the FSIA, foreign states are presumed to be immune from subject-matter jurisdiction, subject to a number of specified exceptions. 28 U.S.C. §§ 1604-1607; *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989) (holding FSIA provides the "sole basis for obtaining jurisdiction over a foreign state in the courts of this country"). To obtain personal jurisdiction over a foreign state, an exception to immunity must apply and service of process must be made under § 1608(a). 28 U.S.C. § 1330(a)-(b).

Section 1608(a) prescribes the exclusive methods for serving a foreign state or its political subdivision in federal litigation. Service on a foreign state's agency or instrumentality is effected under § 1608(b).

See Fed. R. Civ. P. 4(j)(1) ("A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608.").

The provisions for service under § 1608(a) are "hierarchical, such that a plaintiff must attempt the methods of service in the order they are laid out in the statute." *Magness*, 247 F.3d at 613 (citing H.R. Rep. No. 94-1487, at 24 (1976)). First, service must be effected on a foreign state pursuant to any "special arrangement for service" between the plaintiff and the foreign state. 28 U.S.C. § 1608(a)(1). If the parties lack a special arrangement for service, then process must be served "in accordance with an applicable international convention on service of judicial documents." *Id.* § 1608(a)(2).

If no convention applies, service then must be attempted on the foreign state by the third method — the provision at issue here — which requires service by "any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." *Id.* § 1608(a)(3). Finally, if service cannot be achieved under that provision within 30 days, plaintiffs must then resort to diplomatic channels, aided by the U.S. Department of State. *Id.* § 1608(a)(4).

The FSIA's service provision for foreign states, § 1608(a), differs in several ways from its provision for service on foreign states' agencies and instrumentalities, § 1608(b). Most notably, § 1608(b) allows service on an agency or instrumentality by delivery methods "reasonably calculated to give actual notice." 28 U.S.C. § 1608(b)(3). In contrast,

actual notice is not included as a consideration for effective service under § 1608(a).

Because of this distinction, courts have held that service on a foreign state requires "strict compliance" with the terms of § 1608(a), while service on agencies and instrumentalities of a foreign state requires only "substantial compliance" with § 1608(b). *See Magness*, 247 F.3d at 615, 619 n.19 (concluding that failure to serve in "strict compliance" with § 1608(a) rendered default judgment void); *Transaero*, 30 F.3d at 154 (same).

Accordingly, for service to be effective on a foreign state under the third method of service, the service documents must have been sent "by any form of mail . . . *addressed* and *dispatched* . . . *to* the head of the ministry of foreign affairs of the foreign state." 28 U.S.C. § 1608(a)(3) (emphasis added).

B. Background And Proceedings Below

On October 12, 2000, terrorists bombed the U.S.S. *Cole* as it was refueling in the Port of Aden, Yemen, killing seventeen U.S. sailors and injuring forty-two others. The terrorist organization al Qaeda and its leader Osama Bin Laden claimed "credit" for the heinous attack.

On October 2010, fifteen of the injured sailors and three of their spouses brought suit in the U.S. District Court for the District of Columbia under the FSIA, 28 U.S.C. § 1605A, seeking to hold Sudan, a sovereign nation in northeastern Africa, liable for the injuries resulting from the bombing. Plaintiffs alleged that al Qaeda was responsible for the attack

and that Sudan had provided "material support" to al Qaeda and Bin Laden. Sudan vehemently denies these allegations and expresses its deep condolences to the victims of this horrific act and their families. Sudan maintains that it should be given the opportunity to defend itself, on the merits, against the serious allegations that underlie this action.

1. District Court Proceedings (D.D.C.)

To effect service of their complaint on Sudan, Plaintiffs requested that the Clerk of the D.C. District Court mail a copy of the summons and complaint pursuant to the third method of service under the FSIA, 28 U.S.C. § 1608(a)(3). App. 128a-129a. On November 17, 2010, the documents were sent via registered mail, return receipt requested, to:

> Republic of Sudan
> Deng Alor Koul
> Minister of Foreign Affairs
> Embassy of the Republic of Sudan
> 2210 Massachusetts Avenue NW
> Washington, DC 20008

App. 132a.

The record does not show whether the papers were ever received at the Sudanese Embassy. App. 134a (showing the package's end destination as "Charlotte Hall, Maryland"). The record also does not show that the package ever was forwarded to the head of the Ministry of Foreign Affairs in Khartoum, the capital. Notably, Mr. Deng Alor Kuol was not the Minister of Foreign Affairs of Sudan at the time the papers were sent, having left office on May 30, 2010.

See U.N. Protocol & Liaison Serv., *Heads of State, Heads of Government, Ministers for Foreign Affairs* at 55 (Nov. 26, 2012).

A return receipt for the mailing, containing an illegible signature, was returned to the Clerk of the Court and received on November 23, 2010. App. 133a. No attempt was made to serve Sudan at the Ministry of Foreign Affairs in Sudan.

Sudan, in the midst of civil and political unrest, did not appear in the action, and the Clerk of the Court entered a default against Sudan. On March 30, 2012, following a hearing, the D.C. District Court entered a default judgment against Sudan finding jurisdiction and liability and awarding damages in the amount of $314,705,896. App. 22a-25a. As required under 28 U.S.C. § 1608(e), Plaintiffs sought to serve the default judgment on Sudan, pursuant to the procedures prescribed in § 1608(a). Again, the papers were mailed to Sudan's Embassy in Washington, D.C. App. 5a.

2. District Court Proceedings (S.D.N.Y.)

Plaintiffs registered the default judgment in the U.S. District Court for the Southern District of New York to begin the attachment and execution process. Plaintiffs petitioned for turnover of assets from respondent banks holding funds blocked pursuant to the Sudanese Sanctions Regulations (31 C.F.R. Part 538). The S.D.N.Y. District Court granted several of the petitions, issuing turnover orders on December 12, 2013, December 13, 2013, and January 6, 2014, in partial satisfaction of the default judgment. App. 76a-91a. Plaintiffs again purported to serve

these orders on Sudan's Minister of Foreign Affairs by U.S. mail via Sudan's Embassy in Washington, D.C.

Sudan appeared in the enforcement action, and on January 13, 2014, timely appealed all three turnover orders.

In April 2015, Sudan engaged undersigned counsel to represent its interests and help Sudan defend on the merits in all U.S. litigations against Sudan, including by moving to vacate default judgments, appealing the entry of such judgments, and moving to dismiss newly filed actions. In the present action, Sudan moved in the D.C. District Court on June 14, 2015, to vacate the default judgment under Federal Rule of Civil Procedure 60(b), for, among other reasons, failure to serve process in accordance with § 1608(a)(3). That motion remains pending.

3. Second Circuit Appeal

On appeal of the turnover orders, Sudan's principal argument was that the default judgment was void and the lower court thus lacked jurisdiction to grant the turnover petitions, because Sudan had not been served in the D.D.C. action in accordance with the FSIA. *See Magness*, 247 F.3d at 615 (holding that failure to serve in "strict compliance" with § 1608(a) rendered default judgment void and unenforceable); *Transaero*, 30 F.3d at 154 (same).

In a striking departure from decades of appellate and district court decisions declining to authorize service at a foreign state's U.S. mission or via another

agent for service, the Second Circuit affirmed the S.D.N.Y.'s turnover orders, finding that service "via" or in "care of" a sovereign's diplomatic mission in the United States was authorized. App. 11a-14a.

4. Petition For Rehearing

Sudan petitioned for rehearing or rehearing en banc, and the United States submitted a brief as amicus curiae in support of Sudan's petition.

The United States argued that the Second Circuit's holding "runs contrary to the FSIA's text and history, and is inconsistent with the United States' international treaty obligations and international practice." U.S. Br., *Harrison*, at 1 (App. 140a). The United States explained that under U.S. and international law, an "intrusion on a foreign embassy" through service by U.S. mail occurs, in violation of the Vienna Convention on Diplomatic Relations, whether the embassy "is the ultimate recipient or merely the conduit of a summons and complaint." *Id.* at 5 (App. 144a) (citing 23 U.S.T. 3227, 500 U.N.T.S. 95 art. 22). The United States also warned of "strong reciprocity interests at stake," because it rejects any attempt at service made upon the United States abroad "through an embassy." *Id.* at 6 (App. 144a-145a).

On March 11, 2016, the Panel held oral argument on the petition, and counsel for Sudan and the United States each advocated for rehearing, while counsel for plaintiffs argued otherwise.

In an opinion dated September 22, 2016, the Panel expressed "some reluctance" to diverge from the

Executive Branch's position, but nevertheless declined to grant rehearing. App. 109a, 113a. The Panel denied that its new rule conflicted with the Vienna Convention, again citing the purported distinction between serving a foreign state "on" as opposed to "via" its embassy.

In its opinion denying rehearing, the Panel also held for the first time that the purported acceptance by the Sudanese Embassy of Plaintiffs' service package constituted "consent" to entry onto its premises within the meaning of Article 22(1) of the Vienna Convention on Diplomatic Relations. App. 107a. To reach this conclusion, the Panel made a new factual finding wholly unsupported by the record — that "[i]nstead of rejecting the service papers, Sudan accepted them and then, instead of returning them, it explicitly acknowledged receiving them." *Id.* Even if such fact were true (despite the illegible signature on the return receipt and the tracking record casting serious question on the package's end destination), it would be immaterial, as Article 22(1) explicitly requires "consent of the *head of the mission*," which was never alleged, let alone shown, to have been provided here. Vienna Convention on Diplomatic Relations art. 22(1), Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (emphasis added). Because the Panel's new conclusion constructively amended the Panel's underlying Opinion, Sudan sought leave to file a Supplemental Petition in support of its pending Petition for Rehearing En Banc. The Panel denied that request.

On December 9, 2016, the Second Circuit issued an order denying rehearing en banc. App. 114a-115a.

REASONS FOR GRANTING THE PETITION

I. In Direct Conflict With Decisions Of The D.C., Fifth, And Seventh Circuits, The Second Circuit Erroneously Held That Service Mailed To Sudan's Embassy In The United States Complied With § 1608(a)(3)

Section 1608(a)(3) requires that service on a foreign state be sent "by any form of mail . . . *addressed* and *dispatched* . . . *to* the head of the ministry of foreign affairs of the foreign state." 28 U.S.C. § 1608(a)(3) (emphasis added). The natural reading of this provision is that service must be sent *directly* to the head of the ministry of foreign affairs at the ministry in the foreign state, where the minister is located. The D.C., Fifth, and Seventh Circuits follow this reading.

The D.C. Circuit made this position clear in a suit against the Embassy of Zambia. *See Barot v. Embassy of the Republic of Zambia*, 785 F.3d 26, 28, 30 (D.C. Cir. 2015). As a political subdivision of the Republic of Zambia, the Zambian Embassy was subject to service only under § 1608(a). The D.C. Circuit, emphasizing that "strict adherence to the terms of 1608(a) is required," stated that one of plaintiffs' prior attempts at service was unsuccessful because it had been attempted "at the Embassy in Washington, D.C., rather than *at the Ministry of Foreign Affairs in Lusaka, Zambia, as the Act required.*" *Id.* at 27, 28 (emphasis added). The appeals court ultimately directed that service be "sent to the head of the ministry of foreign affairs in Lusaka, Zambia." *Id.* at 30 (internal quotation marks omitted).

The D.C. Circuit in *Barot* relied on a prior D.C. Circuit decision supporting the same natural reading of § 1608(a)(3). *See Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 153-54 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1150 (1995). In *Transaero*, the appeals court vacated a default judgment as "void and unenforceable," despite the foreign state's actual notice, because service under § 1608(a)(3) had been mailed to the "Bolivian Ambassador and Consul General in Washington . . . but never the Ministry of Foreign Affairs or the Secretary of State." *Id.* at 153. Again consistent with the natural reading of § 1608(a)(3), the *Transaero* court held that § 1608(a)(3) "mandates service of the Ministry of Foreign Affairs, the department most likely to understand American procedure." *Id.* at 154.

The D.C. Circuit's position is significant, because venue over a foreign state automatically lies in that Circuit, and thus suits against sovereigns are commonly brought there, resulting in a well-developed body of law under the FSIA. *See* 28 U.S.C. § 1391(f) (establishing venue in the D.C. District Court for all civil actions brought against a foreign state).

The Fifth Circuit also has adopted the natural reading of § 1608(a)(3), holding that service on the Russian Federation and Ministry of Culture under this provision required service on the head of the Russian Ministry of Foreign Affairs, "through the Ministry of Foreign Affairs." *Magness v. Russian Fed'n*, 247 F.3d 609, 613 (5th Cir. 2001), *cert. denied*, 534 U.S. 892 (2001). The Fifth Circuit categorically rejected plaintiffs' attempt to serve Russia and its

political subdivision by papers transmitted by the Texas Secretary of State to Russia "c/o" or in "care of" Boris Yeltsin and to the Ministry of Culture in "care of" the Deputy Minister of Culture. *Id.* at 611.

The Seventh Circuit has followed this interpretation as well. In *Alberti v. Empresa Nicaraguense De La Carne*, the appeals court held that service was improper because it had not been mailed to the head of Nicaragua's ministry of foreign affairs, but rather to the Nicaraguan Ambassador in Washington, D.C. 705 F.2d 250, 253 (7th Cir. 1983). In support of its holding, the Seventh Circuit found that § 1608(a)(3), as instructed by the statute's legislative history, "precluded" service by mail upon an embassy. *Id.* The prohibition on embassy service was followed in *Autotech Technologies LP v. Integral Research & Development Corp.*, 499 F.3d 737, 748-49 (7th Cir. 2007), *cert. denied*, 552 U.S. 1231 (2008) ("service *through* an embassy is expressly banned both by an international treaty to which the United States is a party and by U.S. statutory law" (emphasis added)). A number of district courts have reached the same conclusion. *See, e.g., Ellenbogen v. Canadian Embassy*, No. 05-1553, 2005 WL 3211428, at *2 (D.D.C. Nov. 9, 2005) (service of process on embassy does not satisfy § 1608(a)); *Lucchino v. Foreign Countries of Brazil, South Korea, Spain, Mexico, & Argentina*, 631 F. Supp. 821, 827 (E.D. Pa. 1986) (same).

The United States has repeatedly urged that § 1608(a)(3) requires service on the foreign minister at the ministry in the foreign state, and not on or through an agent for forwarding. In the Second

Circuit proceedings below, the United States stated: "The most natural understanding of [§ 1608(a)(3)] is that the mail will be sent to the head of the ministry of foreign affairs at his or her regular place of work — *i.e.*, at the ministry of foreign affairs in the state's seat of government — not to some other location for forwarding." U.S. Br., *Harrison*, at 2 (App. 141a). Similarly, in Sudan's appeal of another case involving the same service issue, currently pending before the Fourth Circuit, the United States has explained:

> [N]aturally read, the provision requires delivery to the official's principal place of business, the ministry of foreign affairs in the foreign state's seat of government. A state's foreign minister does not work in the state's embassies. Had Congress contemplated delivery to embassies, it would have enacted a statute requiring service to be addressed to the foreign state's ambassador.

Brief for United States as Amicus Curiae at 8-9, *Kumar v. Republic of Sudan*, No. 16-2267 (4th Cir. Feb. 7, 2017), ECF No. 25-1 (App. 160a-161a); *see also* Statement of Interest of the United States at 4, *Dorsey v. Gov't of China*, No. 08-cv-1276 (D.D.C. Dec. 31, 2008), ECF No. 10 (arguing that § 1608(a)(3) requires "the clerk of court to mail the suit papers to the ministry of foreign affairs *in the PRC*" (emphasis added)); Brief of the United States as Amicus Curiae at 16, *Swezey v. Merrill Lynch*, 997 N.Y.S. 2d 45 (N.Y. App. Div. 2014) (No. 155600/13) ("None of the available methods [under the FSIA] includes service by mailing papers to a consulate or embassy . . . .").

Rejecting the natural reading, and departing significantly from the D.C., Fifth, and Seventh Circuits, the Second Circuit below concluded that service addressed and mailed to the foreign minister at the Sudanese Embassy in the United States satisfied § 1608(a)(3). The Panel reasoned that service "via" or in "care of" an embassy was permissible under § 1608(a)(3) because the plain language of the statute did not prohibit it. App. 10a-11a, 13a-14a. The Panel presumed that mailing the papers to the Embassy would satisfy § 1608(a)(3), because once the papers were received by the Embassy, they "can be forwarded to the minister [in the foreign state] by diplomatic pouch." App. 14a.

The Panel supported its opinion by pointing to two district court decisions from the Eastern District of Virginia that held that "service on a minister of foreign affairs via an embassy constitutes literal compliance with [§ 1608(a)(3)]." App. 11a-12a (citing *Rux v. Republic of Sudan*, No. 2:04-cv-428, 2005 WL 2086202, at *16 (E.D. Va. Aug. 26, 2005); *Wye Oak Tech., Inc. v. Republic of Iraq*, No. 1:09-cv-793, 2010 WL 2613323, at *5-6 (E.D. Va. June 29, 2010)). The service conclusion in *Rux* was, however, dicta. *Rux*'s actual holding was that Sudan's former counsel had *waived* personal jurisdiction by making the service argument in their brief but not their cover motion. *Rux*, 2005 WL 2086202, at *2. *Wye Oak* simply relied on that dicta from *Rux*. Moreover, the *Rux* and *Wye Oak* plaintiffs, unlike Plaintiffs here, also had served process under § 1608(a)(4), so service via the embassy was supplemental to valid service.

The Panel resisted the argument that its holding conflicted with D.C., Fifth, and Seventh Circuit cases. App. 12a-13a; App. 103a-104a. It observed that none of those cases held "that the mailing of papers addressed to the minister of foreign affairs via an embassy does *not* comply with the statute." App. 103a. The Panel's attempted distinction, with which the United States has expressly disagreed (U.S. Br., *Harrison*, at 5-6 (App. 144a)), cannot be sustained, nor can it so easily dispense with the circuit conflict its Opinion has created. No meaningful distinction exists between service "via" an embassy and service "on" an embassy. A foreign state's embassy or other diplomatic mission has no legal personality distinct from the foreign state itself. *See, e.g., Barot*, 785 F.3d at 27-30 (holding that an embassy, as a "political subdivision" of the state, must be served in "strict compliance" with terms of § 1608(a)). As the United States has explained, the "intrusion on a foreign embassy is present whether [the embassy] is the ultimate recipient or merely the conduit of a summons and complaint." U.S. Br., *Harrison*, at 5 (App. 144a). In any event, the Panel's conclusion is inherently contradictory, namely that an embassy cannot be served directly in any suit against it (because the embassy *is part of* the foreign state), but that service *via* the embassy would be acceptable where the foreign state is the defendant.

The Panel also attempted to mask the circuit split it has created by brushing aside several appeals court decisions. For example, it suggested that the Fifth Circuit in *Magness* rejected plaintiffs' attempt to serve Russia by forwarding documents *to* Boris Yeltsin and the Minister of Culture (App. 12a), but in

fact, the Fifth Circuit had rejected *the very scenario the Second Circuit authorizes below*: service sent "c/o" or in "care of" an agent associated with the foreign state. *See Magness*, 247 F.3d at 611, 613. Likewise, the Second Circuit described the issue in *Barot* as involving a "service package addressed to embassy" (App. 104a), but it conveniently ignored that the D.C. Circuit repeatedly emphasized that the *only* effective service on the Zambian embassy for the suit against it was service under § 1608(a)(3) *at* the Ministry of Foreign Affairs *in Zambia*. *See Barot*, 785 F.3d at 28, 30.

Beyond its quick dismissal of prior appellate cases and radical departure from the natural reading of the statute, the Panel's reasoning is flawed for a number of reasons.

First, the Panel reasoned that Congress could have limited the place of mailing if it had wanted, as evident in the contrast between § 1608(a)(3) and § 1608(a)(4). App. 10a-11a. Section 1608(a)(4) specifies that the papers be mailed "to the Secretary of State *in Washington, District of Columbia*." The inclusion, however, of "in Washington, District of Columbia" in § 1608(a)(4) is necessary in order to distinguish the secretary of state for the U.S. government sitting in the District of Columbia from the secretaries of state located in each of the 50 states. A similar specification of location is not necessary, or possible, with respect to a minister of foreign affairs in § 1608(a)(3), because each foreign state only has *one* such minister, who is located at the ministry, generally in the foreign state's capital city.

Second, the Panel's conclusion that § 1608(a) authorizes an agent, here the Embassy, to transmit the service papers to the minister of foreign affairs is unsupportable when read in the context of both §§ 1608(a) and (b). Section 1608(b) expressly permits service on a state's agencies and instrumentalities by delivery to an "officer, a managing or general agent, or to any other [authorized] agent." Section 1608(a), on the other hand, makes no reference to an officer or agent with regard to service on the foreign state itself. As the United States has argued, "[t]hat difference strongly suggests that Congress did not intend to allow service on a foreign state via delivery to any entity that could, by analogy, be considered the foreign state's officer or agent, including the state's embassy, even if only for purposes of forwarding papers to the foreign ministry." U.S. Br., *Harrison*, at 3 (App. 142a).

Third, the Panel's reading of § 1608(a)(3) renders its terms inconsistent with obligations of the United States under the Vienna Convention. This reading is not permitted because § 1604 of the FSIA makes clear that all provisions of the Act are "[s]ubject to existing international agreements to which the United States is a party at the time" of its enactment. 28 U.S.C. § 1604. The United States was a party to the Vienna Convention on Diplomatic Relations at the time of the enactment of the FSIA in 1976. *See* 23 U.S.T. 3227 (entered into force with respect to the United States on December 13, 1972). Article 22 of the Vienna Convention provides that "the premises of the mission shall be inviolable."

Under U.S. and international law, it is well established that Article 22 prohibits service of process on a sovereign's embassy, consulate, and diplomatic officers. *See, e.g.*, *Autotech Techs.*, 499 F.3d at 748 ("service through an embassy is expressly banned" by Vienna Convention); Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 124 (4th ed. 2016) ("The view that service by post on mission premises is prohibited seems to have become generally accepted in practice."); James Crawford, *Brownlie's Principles of Public International Law* 403 (8th ed. 2012) ("It follows from Article 22 that writs cannot be served, even by post, within the premises of a mission but only through the local Ministry for Foreign Affairs."); Ludwik Dembinski, *The Modern Law of Diplomacy* 193 (1988) ("[Article 22] protects the mission from receiving by messenger or by mail any notification from the judicial or other authorities of the receiving State.").

Accordingly, to the extent there was any ambiguity about the proper reading of § 1608(a)(3), the Panel should have interpreted the provision to be consistent with U.S. obligations under the Vienna Convention. *See* Restatement (Third) of the Foreign Relations Law of the United States § 114 (Am. Law Inst. 1986) ("Where fairly possible, a United States statute is to be construed so as not to conflict with . . . an international agreement of the United States."); *Roeder v. Islamic Republic of Iran*, 646 F.3d 56, 61 (D.C. Cir. 2003) ("Legislation abrogating international agreements must be clear to ensure that Congress — and the President — have considered the consequences. An ambiguous statute

cannot supercede an international agreement if an alternative reading is fairly possible." (internal quotation marks and citation omitted)).

The Panel could have corrected this error on rehearing, following receipt of the U.S. government's brief explaining the Panel Opinion's divergence from the Vienna Convention's inviolability principle. The Panel, however, compounded its error by rejecting the United States' interpretations of the Vienna Convention. App. 105a, 109a; *cf. Abbott v. Abbott*, 560 U.S. 1, 15 (2010); *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982).

Finally, the Panel failed to properly and fully consider § 1608's legislative history. Contrary to the Panel's suggestion (App. 13a), the legislative history of § 1608 is extensive and establishes that service by mail via a foreign state's embassy contravenes Article 22 of the Vienna Convention and thus was purposely *excluded* from § 1608.

Specifically, while the first version of the bill that became the FSIA allowed for service against a foreign state by "registered or certified mail . . . to the ambassador or chief of mission of the foreign state" in conjunction with service through the diplomatic channels via the State Department (S. 566, 93d Cong. § 1608 (1973)), the text was revised to accommodate the complaints of foreign missions that a mailing to the embassy would violate Article 22. *See* 71 Dep't of State Bull. 458-59 (1974).

Further amendments to H.R. 11315 (which ultimately became the FSIA) edited § 1608(a) to require that mailed service be addressed "to the head

of the ministry of foreign affairs of the foreign state concerned." 122 Cong. Rec. 33,536 (1976) (enacted). The House Report on H.R. 11315 reiterated that the new § 1608(a) precluded a mailing "to a diplomatic mission of the foreign state . . . so as to avoid questions of inconsistency with section 1 of article 22 of the Vienna Convention." H.R. Rep. No. 94-1487 at 26 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6625.

The Panel below considered the House Report but quickly dismissed it on the basis that the report "fails to make the distinction at issue in the instant case, between 'service *on* an embassy by mail,' and service on a minister of foreign affairs *via* or *in care of* an embassy." App. 13a (alterations in original, internal citations omitted). Yet again, the Panel cited no authority, beyond two cases of the Eastern District of Virginia, to support this novel and artificial distinction.

The overwhelming weight of authority — including decisions from three circuits, the text and history of the FSIA, and the views of the United States — contradicts the Second Circuit's rule. Only this Court can correct this split in authority. Indeed, further emphasizing the serious need for uniformity in the treatment of foreign states in U.S. courts, the question presented here also is pending presently in a case before the Fourth Circuit, indicating that the circuit split could further deepen absent guidance from this Court. *See Kumar v. Republic of Sudan*, No. 16-2267 (4th Cir.).

II. The Question Presented Is Of Significant And Immediate National Importance

A. The Panel Opinion Places The United States In Violation Of Its Obligations Under The Vienna Convention

The United States maintained below, consistent with its position in many other cases, that the Panel Opinion contravenes the Vienna Convention on Diplomatic Relations. *See* U.S. Br., *Harrison*, at 1 (App. 140a) (urging rehearing of the Panel Opinion because interpreting § 1608(a)(3) to permit service *via* Sudan's Embassy "is inconsistent with the United States' international treaty obligations and international practice"); *see also* Brief for the United States as Amicus Curiae at 13, *Kumar v. Republic of Sudan*, No. 16-2267 (4th Cir. Feb. 7, 2017), ECF No. 25-1 (App. 164a-165a) ("[t]he courts owe deference to" the United States' interpretation of the Vienna Convention as precluding mail "to a foreign embassy as a means of serving a foreign state"); Suggestion of Immunity and Statement of Interest of the United States at 13-14, *Hmong I v. Lao People's Democratic Republic*, No. 2:15-cv-2349 (E.D. Cal. Feb. 12, 2016), ECF No. 23 (service upon Laos via its embassy contravened Article 22 of the Vienna Convention); Statement of Interest of the United States at 12, *Avelar v. J. Cotoia Const. Inc.*, 2011 WL 5245206 (E.D.N.Y. Nov. 2, 2011) (No. 11-2172), ECF No. 14 ("The principle of mission inviolability set forth in Article 22 precludes service of process on the premises of a mission."); Brief of the United States as Amicus Curiae at 16, *Swezey v. Merrill Lynch*, 997 N.Y.S. 2d 45 (N.Y. App. Div. 2014) (No. 155600/13)

(service on Philippines through U.S. embassy and consulate "is inconsistent with the United States' international treaty obligations"); *id.* at 20 (stating that court order requiring service of legal documents upon embassy violates Article 22 and was "unlawful"). Widespread adherence to the Vienna Convention is one of the essential pillars of foreign relations. *See* Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 1-2 (4th ed. 2016) (explaining that the Vienna Convention has "a remarkably high degree of observance" and is a "cornerstone of the modern international legal order").

The United States' interpretation of its treaties is "entitled to great weight." *Abbott v. Abbott*, 560 U.S. 1, 15 (2010). Moreover, where the parties to a treaty both agree on its interpretation, U.S. courts must defer to that interpretation "absent extraordinarily strong contrary evidence." *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982). The Second Circuit, however, all but ignored the views and treaty obligations of the United States, leaving Sudan indebted by a default judgment of over $300 million.

In denying rehearing, the Panel attempted to square its interpretation of § 1608(a)(3) with Article 22, again emphasizing that its new rule permits only service "via," not "on," an embassy. App. 105a-106a. But the Panel offered no basis to sustain that artificial distinction under either U.S. or international law, and instead defended its Opinion by stating in conclusory fashion that it did "not hold that an embassy is an agent for service or a proxy for

service for a foreign state." App. 101a. But that is precisely what the Panel held: that a foreign state's embassy may be required to act as a forwarding agent for service of legal process in private litigation. As the United States observed:

> The panel assumed that the papers would be forwarded on to the foreign minister via diplomatic pouch, which is provided with certain protections under the [Vienna Convention] to ensure the safe delivery of "diplomatic documents and articles intended for official use." But one sovereign cannot dictate the internal procedures of the embassy of another sovereign, and a foreign government may well object to a U.S. court instructing it to use its pouch to deliver items to its officials on behalf of a third party.

U.S. Br., *Harrison*, at 5-6 (App. 144a) (citation omitted).

The Panel Opinion constitutes a direct violation of the principle of inviolability under Article 22 by requiring a foreign mission to place U.S. service of process in the mission's diplomatic pouch. Furthermore, the Panel Opinion does not foreclose the possibility that, given the statute's purported "silence" on the location for service, addressing the mailing to other non-ministry addresses may yet be permitted. Embassies, consulates, U.N. missions, and military outposts all could be tasked with transmitting service of process on behalf of a third party to the minister of foreign affairs under the

Second Circuit's rule. And if service is not properly transmitted onwards to the minister of foreign affairs by any one of those entities, foreign states could face the very real prospect of having default judgments enforced against them, as Sudan has in this case.

This issue is not hypothetical. Dozens of FSIA cases are initiated against foreign states each year, and over a hundred foreign states are subject to potential service under § 1608(a)(3) because they are not signatories to "an applicable international convention on service of judicial documents." 28 U.S.C. § 1608(a)(2); *see* Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163; Inter-American Convention on Letters Rogatory, Jan. 30, 1975, S. Treaty Doc. No. 98-27, 1438 U.N.T.S. 288; Additional Protocol to the Inter-American Convention on Letters Rogatory, May 8, 1979, 1438 U.N.T.S. 322. Already plaintiffs have begun taking advantage of the option of serving foreign state defendants at their embassies and consulates in the United States. *See, e.g.*, Letter at 2, *Park v. Embassy of Indonesia*, No. 1:16-cv-6652 (E.D.N.Y. Feb. 13, 2017), ECF No. 7 (mailing service documents to Indonesia's embassy in Washington, D.C.); Proof of Service Ex. A at 1, *Hmong I v. Lao People's Democratic Republic*, No. 2:15-cv-2349 (E.D. Cal. Dec. 28, 2015), ECF No. 9 (delivering service documents to Laos through its embassy and ambassador in Washington, D.C.); *see also* Order at 2, *Pereira v. Consulate Gen. of Brazil in N.Y.*, No. 15-cv-2593 (S.D.N.Y. Dec. 29, 2015), ECF No. 15 (ordering plaintiff to move the clerk for service upon Brazilian consulate in New York under

§ 1608(a)(3) and advising plaintiff that "it is permissible to serve the head of a country's ministry of foreign affairs via that country's diplomatic mission" pursuant to *Harrison*).

The Panel Opinion threatens the serious erosion of the Vienna Convention, and this Court should review the case to prevent any future diplomatic complications or disputes.

B. The Panel Opinion Compromises U.S. Interests Abroad

The Panel's disregard for the Vienna Convention also exposes the United States to reciprocal treatment in foreign courts. Illustrating the gravity of its concern, the United States submitted a statement of interest both in the proceedings below and in the pending Fourth Circuit appeal (*Kumar v. Republic of Sudan*, No. 16-2267 (4th Cir.)). As the United States elaborated:

> [T]he United States routinely refuses to recognize the propriety of a private party's service through mail or personal delivery to the United States embassy. When a foreign litigant . . . purports to serve the United States through its embassy, the embassy sends a diplomatic note to the foreign government explaining that the United States does not consider itself to have been served consistently with international law and thus will not appear in the litigation or honor any

> judgment that may be rendered against it.

Brief for United States as Amicus Curiae at 13-14, *Kumar v. Republic of Sudan*, No. 16-2267 (4th Cir. Feb. 7, 2017), ECF No. 25-1 (App. 165a).

Indeed, the United States has appeared in a significant number of U.S. cases to defend its interests from the consequences of authorizing service of process via embassies, and U.S. courts have recognized these concerns. *See, e.g.*, Brief of the United States as Amicus Curiae at 19, *Swezey v. Merrill Lynch*, 997 N.Y.S. 2d 45 (N.Y. App. Div. 2014) (No. 155600/13) (recognizing that allowing service of process on a foreign sovereign's embassy or diplomatic mission "can cause significant friction in [its] foreign relations" and that the United States "routinely objects to attempts by private parties or foreign courts to serve [the] U.S. diplomatic missions or consulates overseas"); Brief of the United States as Amicus Curiae at 3, *Magness v. Russian Fed'n*, 247 F.3d 609 (5th Cir. May 30, 2000) (No. 00-20136) ("[P]roper service of process against the United States in foreign courts is of enormous importance to the Federal Government. If United States courts follow the service rules established for suits against foreign states, . . . that practice will increase the likelihood that the United States will be treated properly in foreign courts, according to developed service of process rules . . . ."); *see also 767 Third Ave. Assocs. v. Permanent Mission of Zaire*, 988 F.2d 295, 300-01 (2d Cir. 1993) ("Were the United States to adopt exceptions to the inviolability of foreign missions here, it would be stripped of its most powerful

defense, that is, that international law precludes the nonconsensual entry of its missions abroad.").

For decades, the United States has routinely and actively resisted attempts at service of foreign litigation mailed to its embassies and consulates, citing Article 22 of the Vienna Convention. In one such example, the United States objected to service by mail delivered to its Toronto Consulate, maintaining that "because service was defective, the United States is not a party to [the] case and therefore, the United States will not respond." *United States v. Zakhary*, [2015] F.C. 335, para. 6 (Can. Fed. Ct.). Service in that case was ultimately found ineffective.

As the statements and objections of the United States make plain, the potential consequences of the Second Circuit's departure from seemingly settled law are considerable and warrant immediate review.

Finally, the recent improvement in relations between the United States and Sudan supports review in this case. Over the last several years, Sudan has worked diligently and cooperatively with the United States to address regional conflicts and combat the threat of terrorism. As a result of this cooperation, as well as other positive actions by Sudan over the past year, the United States announced on January 13, 2017 that it was lifting certain country-wide sanctions that had been imposed against Sudan for nearly twenty years. Exec. Order No. 13761, 82 Fed. Reg. 5331 (Jan. 13, 2017). The Second Circuit's endorsement of defective service of process against a foreign state runs counter to the United States' interests in

improving relations with sovereigns such as Sudan, a sovereign that has repeatedly expressed its good-faith commitment to defending the merits of this case and others like it.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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March 9, 2017

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed 09/23/2015]

August Term 2014

(Argued: January 5, 2015
Decided: September 23, 2015)

Docket No. 14-121-cv

RICK HARRISON, JOHN BUCKLEY, III, MARGARET LOPEZ, ANDY LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARD LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, MARTIN SONGER, JR., SHELLY SONGER, JEREMY STEWART, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE, TRACEY SMITH, as personal representative of the Estate of Rubin Smith,

Plaintiffs-Appellees,

v.

REPUBLIC OF SUDAN,

Defendant-Appellant,

ADVANCED CHEMICAL WORKS, AKA Advanced Commercial and Chemical Works Company Limited, AKA Advanced Training and Chemical Works Company Limited, Accounts & Electronics Equipments, AKA Accounts and Electronics Equipments, et al.,

Defendants,

NATIONAL BANK OF EGYPT, CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK,

Respondents.[*]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Before:

LYNCH and CHIN, *Circuit Judges*, and KORMAN, *District Judge*.[**]

Appeal from three orders of the United States District Court for the Southern District of New York (Torres, *J.*), requiring respondent banks holding assets of defendant-appellant Republic of Sudan to turn over funds to satisfy an underlying default judgment obtained by plaintiffs-appellees against the Republic of Sudan in the United States District Court for the District of Columbia. The Republic of Sudan contends that (1) service of process did not comply with the Foreign Sovereign Immunities Act, and (2) the District Court erred by attaching assets of a foreign state to satisfy a judgment under the Terrorism Risk Insurance Act without authorization from the Office of Foreign Assets Control or a Statement of Interest from the Department of Justice.

AFFIRMED.

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[*] The Clerk of Court is respectfully requested to amend the caption as set forth above.

[**] The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

ANDREW C. HALL (Brandon Levitt, *on the brief*), Hall, Lamb and Hall, P.A., Miami, Florida, *for Plaintiffs-Appellees*.

ASIM GHAFOOR, Law Office of Asim Ghafoor, Washington, D.C., *for Defendant-Appellant*.

CHIN, *Circuit Judge*:

On October 12, 2000, an explosive-laden skiff pulled up alongside the U.S.S. Cole, which was docked for refueling at the port of Aden, Yemen, and detonated. Seventeen U.S. Navy sailors were killed in the attack, and forty-two wounded. Fifteen of the injured sailors and three of their spouses brought suit in 2010 in the United States District Court for the District of Columbia (the "D.C. District Court") under the Foreign Sovereign Immunities Act (the "FSIA"), 28 U.S.C. §§ 1330, 1602 *et seq.*, alleging that al Qaeda was responsible for the attack and that the Republic of Sudan ("Sudan") had provided material support to al Qaeda. In 2012, the D.C. District Court entered a default judgment against Sudan in the amount of $314,705,896.

Plaintiffs registered the default judgment in the United States District Court for the Southern District of New York, and then sought to enforce it against funds held by New York banks. The District Court below (Torres, *J.*) issued the three turnover orders before us.

We hold that (1) service of process on the Sudanese Minister of Foreign Affairs via the Sudanese Embassy in Washington, D.C., complied with the FSIA's requirement that service be sent to the head of the ministry

of foreign affairs, and (2) the District Court did not err in issuing the turnover orders without first obtaining either a license from the Treasury Department's Office of Foreign Assets Control ("OFAC") or a Statement of Interest from the Department of Justice ("DOJ").

We affirm.

STATEMENT OF THE CASE

Plaintiffs-appellants are sailors and spouses of sailors injured in the bombing of the U.S.S. Cole, who brought suit against Sudan in the D.C. District Court on October 4, 2010, under 28 U.S.C. § 1605A, the terrorism exception to the FSIA, alleging that Sudan provided material support to al Qaeda, whose operatives perpetrated the attack on the vessel.[1]

Pursuant to 28 U.S.C. § 1608(a)(3), plaintiffs filed an Affidavit Requesting Foreign Mailing on November 5, 2010, asking that the Clerk of Court mail the summons and complaint via registered mail, return receipt requested, to:

> Republic of Sudan
> Deng Alor Koul
> Minister of Foreign Affairs
> Embassy of the Republic of Sudan
> 2210 Massachusetts Avenue NW
> Washington, DC 2008

S. App. at 66. As represented by plaintiffs, Deng Alor Koul was the Minister of Foreign Affairs of Sudan at the time.

On November 17, 2010, the Clerk of Court entered a Certificate of Mailing certifying that the summons

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[1] One of the sailors died after the suit was brought. His spouse, as representative of his estate, was substituted into the action.

and complaint were sent via domestic certified mail to the "head of the ministry of foreign affairs," at the Sudanese Embassy in Washington, D.C., *id.* at 67, and that the return receipt was returned to the Clerk of Court and received on November 23, 2010. No attempt was made to serve Sudan at the Ministry of Foreign Affairs in Khartoum, the capital. Sudan failed to serve an answer or other responsive pleading within sixty days after plaintiffs' service, *see* 28 U.S.C. § 1608(d), and the Clerk of Court thus entered a default against Sudan.

On March 30, 2012, after a hearing, the D.C. District Court (Lamberth, *J.*) entered a default judgment against Sudan in the amount of $314,705,896, *Harrison v. Republic of Sudan*, 882 F. Supp. 2d 23, 51 (D.D.C. 2012), and found, *inter alia*, that service on Sudan had been proper, *id.* at 28.[2] Following entry of the default judgment, plaintiffs filed a second Affidavit Requesting Foreign Mailing, requesting the Clerk to mail notice, this time of the Order and Judgment and the Memorandum Opinion entered by the D.C. District Court, by registered mail, return receipt requested. The Clerk certified in April 2012 that the documents had been mailed to Sudan's Minister of Foreign Affairs via the Sudanese Embassy in Washington, D.C. Sudan again failed to appear or contest the judgment.

On October 2, 2012, plaintiffs registered the judgment in the Southern District of New York, seeking to execute against respondent banks holding Sudanese

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[2] After oral argument in the instant appeal, Sudan made a Rule 60(b) motion in the D.C. District Court to set aside the default judgment. *Harrison v. Republic of Sudan*, No. 10-CV-1689 (D.D.C. June 14, 2015) (Docket No. 55). Sudan moved to hold this appeal in abeyance pending resolution of the motion for vacatur. We deny the motion.

assets frozen pursuant to the Sudan Sanctions Regulations, *see* 31 C.F.R. Part 538, and on May 9, 2013, plaintiffs filed a Notice of Pending Action.

On June 28, 2013, following a motion by plaintiffs, the D.C. District Court entered an order finding that post-judgment service had been effectuated, and that sufficient time had elapsed following the entry of judgment and the giving of notice of such judgment to seek attachment and execution, pursuant to 28 U.S.C. § 1610(c).[3] On September 20, 2013, the district court below entered a similar order, finding both that sufficient time had passed since entry of the default judgment, and that service of the default judgment had been properly effectuated. Sudan failed to challenge these orders.

Plaintiffs then filed a series of petitions in the Southern District seeking turnover of Sudanese assets, including against Mashreqbank, BNP Paribas, and Credit Agricole Corporate and Investment Bank. The District Court granted the petitions, issuing turnover orders on December 12, 2013, December 13, 2013, and January 6, 2014, respectively. Plaintiffs served all three petitions, as well as their § 1610(c) motion, by U.S. mail addressed to Sudan's Minister of Foreign Affairs – at that point Ali Ahmed Karti, who had replaced Deng Alor Koul as represented by plaintiffs – via the Embassy of Sudan in Washington.

Sudan filed its notice of appearance on January 13, 2014, only after all three turnover orders were entered

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[3] Section 1610(c) provides that "[n]o attachment or execution . . . shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter."

by the District Court below. The same day, Sudan timely appealed.[4]

DISCUSSION

Two issues are presented: (a) whether service of process on the Sudanese Minister of Foreign Affairs via the Sudanese Embassy in Washington complied with the requirement of 28 U.S.C. § 1608(a)(3) that service be sent to the head of the ministry of foreign affairs, and (b) whether the District Court erred in

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[4] As a threshold matter, plaintiffs contend that this Court lacks jurisdiction over the December 12, 2013 and December 13, 2013 orders, and that the appeal is timely only with respect to the January 6, 2014 order, because the notice of appeal was not filed until January 14, 2014. Sudan was required to file a notice of appeal "with the district court clerk within 30 days after entry of the judgment or order appealed from," Fed. R. App. P. 4(a)(1)(A), and "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement," *Bowles v. Russell*, 551 U.S. 205, 214 (2007). Sudan did in fact file a notice of appeal on January 13, 2014, the last day for timely filing of an appeal from the earliest order. Though Sudan neglected to manually select the orders it was appealing on ECF, triggering a "filing error" in the docket entry, Docket No. 34, the notice of appeal was accessible on the docket, the notice itself stated in plain language the three orders at issue, and Sudan corrected the electronic error the next day, by filing an otherwise identical order on January 14, 2014. Because there was no ambiguity in Sudan's January 13, 2014 notice of appeal, the appeal is timely as to all three turnover orders. *See Becker v. Montgomery*, 532 U.S. 757, 767 (2001) ("[I]mperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court."); *see also Contino v. United States*, 535 F.3d 124, 127 (2d Cir. 2008) ("[T]he failure to sign [a notice of appeal] may be remedied after the time period for filing the notice has expired."); *New Phone Co. v. City of New York*, 498 F.3d 127, 131 (2d Cir. 2007) ("Our jurisdiction . . . depends on whether the intent to appeal from that decision is clear on the face of, or can be inferred from, the notices of appeal.").

issuing turnover orders without first obtaining either an OFAC license or a DOJ Statement of Interest explaining why no OFAC license was required.

A. *Service of Process on the Minister of Foreign Affairs*

The FSIA provides the sole means for effecting service of process on a foreign state. *See* 28 U.S.C. § 1608(a); H.R. Rep. No. 94-1487, at 23 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6622 ("Section 1608 sets forth the exclusive procedures with respect to service on . . . a foreign state . . . ."). Four methods of service are prescribed, in descending order of preference. 28 U.S.C. § 1608(a)(1)-(4). Plaintiffs must attempt service by the first method, or determine that it is unavailable, before attempting subsequent methods in the order in which they are laid out.

The first method is service "in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision." *Id.* § 1608(a)(1). In the absence of such a special arrangement, the statute next permits service "in accordance with an applicable international convention on service of judicial documents." *Id.* § 1608(a)(2). If neither of these first two methods is available, plaintiffs may proceed according to the third method, which permits service "by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court *to the head of the ministry of foreign affairs of the foreign state concerned*." *Id.* § 1608(a)(3) (emphasis added). Finally, the statute provides that if service cannot be made under the first three paragraphs, service is permitted as a last resort "by any form of mail

requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services – and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state." *Id.* § 1608(a)(4).

Here, it is undisputed that service in conformity with the first two methods was unavailable, because plaintiffs have no "special arrangement" for service with Sudan, and because Sudan is not a party to an "international convention on service of judicial documents." *Id.* §1608(a)(1)-(2). Thus, § 1608(a)(3) was the preferred method of service, and plaintiffs effectuated service in accordance with this paragraph. In the underlying litigation in the D.C. District Court, the Clerk of Court sent process by U.S. mail, return receipt requested, to the Minister of Foreign Affairs, Deng Alor Koul, via the Embassy of Sudan in Washington, D.C.

As an initial matter, plaintiffs complied with the first three clauses of 28 U.S.C. § 1608(a)(3). First, service could not be made under paragraphs (1) or (2) of § 1608(a). Second, plaintiffs directed the Clerk of Court to include in the service package a copy of the summons and complaint, and notice of suit, and the Clerk confirmed that a translation of each was included. And third, plaintiffs directed the clerk of court to serve Sudan by a "form of mail requiring a signed receipt," *id.* § 1608(a)(3), and, after the clerk mailed the service package on November 17, 2010, a

return receipt was in fact received on November 23, 2010.[5]

On appeal, Sudan argues that service on Sudan's Minister of Foreign Affairs via the Sudanese Embassy in Washington does not comply with the requirement of the final clause of 28 U.S.C. § 1608(a)(3), that service be sent "to the head of the ministry of foreign affairs." Sudan contends that service should have been sent to Sudan's Minister of Foreign Affairs at the Ministry of Foreign Affairs in Khartoum, and because service was ineffective under § 1608(a), the D.C. District Court lacked personal jurisdiction over Sudan.

In answering this issue, one of first impression in our Circuit, we look to the statutory language, cases that have interpreted this statute, and the legislative history. *See United States v. Allen*, 788 F.3d 61, 66 (2d Cir. 2015).

On its face, the statute requires that process be mailed "to the head of the ministry of foreign affairs of the foreign state." 28 U.S.C. § 1608(a)(3). It is silent as to a specific location where the mailing is to be addressed. If Congress had wanted to require that the mailing be sent to the head of the ministry of foreign affairs in the foreign county, it could have said so. In

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[5] At oral argument, counsel for Sudan represented that the Minister of Foreign Affairs did not have actual notice of the underlying suit because at the time of the mailing to the Embassy, Sudan was in the final months of a coalition government with the Sudan People's Liberation Movement, before South Sudan became independent. According to counsel, due to the structure of the power-sharing agreement the Minister of Foreign Affairs would not have received notice from the opposition-controlled Embassy. But on the record before us we can look only at the service as it was mailed and received by the Embassy, and whether that service satisfied the statute.

§ 1608(a)(4), for example, Congress specified that the papers be mailed "to the Secretary of State *in Washington, District of Columbia*, to the attention of the Director of Special Consular Services," for transmittal to the foreign state "through diplomatic channels." *Id.* § 1608(a)(4) (emphasis added). Nothing in § 1608(a)(3) requires that the papers be mailed to a location in the foreign state, and the method chosen by plaintiffs – a mailing addressed to the minister of foreign affairs at the embassy – was consistent with the language of the statute and could reasonably be expected to result in delivery to the intended person.

What little case law there is on this question accords with our reading of § 1608(a)(3), that service on a minister of foreign affairs via an embassy address constitutes literal compliance with the statute. This is not the first time that Sudan has made the argument for a more restrictive reading of § 1608(a)(3). In *Rux v. Republic of Sudan*, the Eastern District of Virginia rejected Sudan's contention that service had to be mailed directly to the Minister of Foreign Affairs at the Ministry of Foreign Affairs in Khartoum, rather than to the Minister of Foreign Affairs via the Sudanese Embassy. No. 04-CV-428, 2005 WL 2086202, at *16 (E.D. Va. Aug. 26, 2005), *aff'd on other grounds*, 461 F.3d 461 (4th Cir. 2006). The district court found that "[t]he text of § 1608(a)(3) does not prohibit service on the Minister of Foreign Affairs at an embassy address. Indeed, the statute does not prescribe the place of service, only the person to whom process must be served." *Id.*

In another case, *Wye Oak Technology, Inc. v. Republic of Iraq*, the Eastern District of Virginia similarly held that service via an embassy is sufficient to satisfy the FSIA as long as the service is directed to

the Minister of Foreign Affairs. No. 09-CV-793, 2010 WL 2613323, at *5-6 (E.D. Va. June 29, 2010), *aff'd on other grounds*, 666 F.3d 2015 (4th Cir. 2011). In *Wye Oak*, a summons was issued by the clerk of the court to the "Head of the Ministry of Foreign Affairs of Iraq, care of the Embassy of the Republic of Iraq in Washington, DC." *Id.* at *4 (internal quotation marks omitted). The district court found that:

> Section (a)(3) does not impose a requirement that an otherwise proper service package must be delivered to a particular destination. No doubt, the address to which the service package is directed must bear some objectively reasonable relationship to the head of the Ministry of Foreign Affairs and the chosen method of delivery must have some reasonable expectation of success. However, there is nothing on the face of Section (a)(3) that prohibits [plaintiff]'s chosen method of delivery to the head of the Ministry of Foreign Affairs . . . .

Id. at *5. We agree.

Cases where § 1608(a)(3) service was held to be ineffective involved suits where service was sent "to a *person* other than the Minister of Foreign Affairs, not to a *place* other than the Ministry of Foreign Affairs." *Rux*, 2005 WL 2086202, at *16 (emphasis in original); *see Magness v. Russian Fed'n*, 247 F.3d 609, 613 (5th Cir. 2001) (finding service improper where complaint sent to Texas Secretary of State for forwarding to Boris Yeltsin, and also sent directly to Russian Deputy Minister of Culture); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 153-54 (D.C. Cir. 1994) (finding service improper when made on "the Bolivian Ambassador and Consul General in Washington, and

the Bolivian First Minister and the Bolivian Air Force in La Paz[,] but never [on] the Ministry of Foreign Affairs or the Secretary of State"); *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 253 (7th Cir. 1983) (holding that the Ambassador of Nicaragua cannot be construed as the head of the ministry of foreign affairs).

The legislative record on § 1608(a)(3) is sparse, and sheds little light on the question. The 1976 House Judiciary Committee Report seemed to contemplate – and reject – service on an embassy in its discussion of proposed methods of service under the FSIA:

> A second means [of service], of questionable validity, involves the mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state. Section 1608 precludes this method so as to avoid questions of inconsistency with section 1 of article 22 of the Vienna Convention on Diplomatic Relations, 23 UST 3227, TIAS 7502 (1972), which entered into force in the United States on December 13, 1972. Service on an embassy by mail would be precluded under this bill. *See* 71 Dept. of State Bull. 458-59 (1974).

H.R. Rep. No. 94-1487, at 26 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6625. This report, though, fails to make the distinction at issue in the instant case, between "[s]ervice *on* an embassy by mail," *id.* (emphasis added), and service on a minister of foreign affairs *via* or *care of* an embassy. The House Report suggests that § 1608 precludes service on an embassy to prevent any inconsistency with the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227 (entered into force in United States Dec. 13, 1972) [hereinafter Vienna Convention]. The relevant

sections of the Vienna Convention say only that "[t]he premises of the mission shall be inviolable," and that "[a] diplomatic agent shall . . . . enjoy immunity from [the host state's] civil and administrative jurisdiction." *Id.* arts. 22, 31. In a case where the suit is not against the embassy or diplomatic agent, but against the foreign state with service on the foreign minister *via* the embassy address, we do not see how principles of mission inviolability and diplomatic immunity are implicated. Moreover, Sudan has not sought to rely on this legislative history.

In this case, service was directed to the right individual, using the Sudanese Embassy address for transmittal. Process was not served on the foreign mission; rather, process was served on the Minister of Foreign Affairs via the foreign mission. The requirement advanced by Sudan, that service be mailed directly to a ministry of foreign affairs in the foreign country, makes little sense from a reliability perspective and as a matter of policy. While direct mailing relies on the capacity of the foreign postal service or a commercial carrier, mail addressed to an embassy – as an extension of the foreign state – can be forwarded to the minister by diplomatic pouch. *See Rux*, 2005 WL 2086202, at *16 (addressing the "inherent reliability and security associated with diplomatic pouches," which, "unlike the United States Postal Service, DHL, or any other commercial carrier, is accorded heightened protection under international law to ensure safe and uncompromised delivery of documents between countries." (citing Vienna Convention, art. 27)).

We conclude that plaintiffs complied with the plain language of the FSIA's service of process requirements at 28 U.S.C. § 1608(a)(3).

Finally, though not well developed in its brief, we construe Sudan as also raising a question as to whether service was proper in the turnover proceedings. Because we have found that service of the default judgment in the underlying D.C. District Court case was proper, Sudan's argument fails. *See* 28 U.S.C. § 1608(e) ("A copy of [the] default judgment shall be sent to the foreign state . . . in the manner prescribed for service in this section."); *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1130 (9th Cir. 2010) ("The FSIA is quite clear what a plaintiff must serve on a foreign state before a court may enforce a default judgment against that state: the default judgment. Service of post-judgment motions is not required."); *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 747-49 (7th Cir. 2007) (holding that the federal rules for service applied because the FSIA's service provisions do not cover post-judgment motions).

Here, plaintiffs served all three turnover petitions at issue, as well as their Motion for Entry of Order Finding Sufficient Time Has Passed to Seek Attachment and Execution of Defendant / Judgment Debtor's Assets, by U.S. mail addressed to Sudan's new Minister of Foreign Affairs, Ali Ahmed Karti, via the Embassy of Sudan in Washington. Service of these post-judgment motions was not governed by the heightened standards of § 1608(a), and was required to adhere only to the notice provisions of the federal rules, with which plaintiffs complied. *See* Fed. R. Civ. P. 5(a)(2) ("No service is required on a party who is in default for failing to appear. But a pleading that asserts a new claim for relief against such a party must be served on that party under Rule 4."); Fed. R. Civ. P. 5(b)(2)(C) ("A paper is served" by "mailing it to the person's last known address – in which event service is complete upon mailing.").

B. *Attachment of Assets Without an OFAC License or Case-Specific DOJ Statement of Interest*

Sudan contends that the District Court erred in ordering the turnover of sanctions-controlled assets without first procuring either an OFAC license or a case-specific DOJ Statement of Interest stating that no OFAC license was necessary. We disagree. The government has made its position known through previous Statements of Interest that judgment holders under the Terrorism Risk Insurance Act of 2002 (the "TRIA"), 28 U.S.C. § 1610 note, are exempt from the normal OFAC licensure requirement, and the government's position is not limited to the cases in which it filed the Statements.

Section 1605 of the FSIA creates exceptions to the general blanket immunity of foreign states from the jurisdiction of U.S. courts, including the "terrorism exception," 28 U.S.C. § 1605A, which Congress added to the FSIA in 1996 to "give American Citizens an important economic and financial weapon against . . . outlaw states" that sponsor terrorism. H.R. Rep. No. 104-383, at 62 (1995). This exception allows courts to hear claims against foreign states designated by the State Department as "state sponsor[s] of terrorism." *See Calderon-Cardona v. Bank of N.Y. Mellon*, 770 F.3d 993, 996 (2d Cir. 2014).[6]

In an effort to further aid victims of terrorism in satisfying judgments against foreign sponsors of

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[6] The State Department currently designates Iran, Sudan, and Syria as state sponsors of terrorism. Sudan has been designated as such since August 12, 1993. U.S. Dep't of State, *State Sponsors of Terrorism*, http://www.state.gov/j/ct/list/c14151.htm (last visited Sept. 22, 2015).

terrorism, Congress enacted the TRIA, the purpose of which is to "deal comprehensively with the problem of enforcement of judgments rendered on behalf of victims of terrorism in any court of competent jurisdiction by enabling them to satisfy such judgments through the attachment of blocked assets of terrorist parties." *Weininger v. Castro*, 462 F. Supp. 2d 457, 483 (S.D.N.Y. 2006) (quoting H.R. Rep. No. 107-779, at 27 (2002)). Section 201(a) of the TRIA, which governs post-judgment attachment in some terrorism cases, provides, in relevant part:

> Notwithstanding any other provision of law . . . , in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605A or 1605(a)(7) (as such section was in effect on January 27, 2008) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

TRIA § 201(a) (codified at 28 U.S.C. § 1610 note).

Sudanese assets in the United States are subject to just such a block, pursuant to sanctions that began with Executive Order 13067 in 1997 and are now administered by OFAC and codified at 31 C.F.R. Part 538. Ordinarily, unless a plaintiff obtains a license from OFAC, he is barred from attaching assets that are frozen under such sanctions regimes. *See Estate of Heiser v. Bank of Tokyo Mitsubishi UFJ, N.Y. Branch*,

919 F. Supp. 2d 411, 422 (S.D.N.Y. 2013).[7] Nonetheless, barring any contrary authority, a court will accept that no OFAC license is required on the authority of a DOJ Statement of Interest filed pursuant to 28 U.S.C. § 517. *Id.* at 423.

The question, then, is whether § 201(a) of the TRIA and § 1610(g) of the FSIA, which authorize the execution of § 1605A judgments against state sponsors of terrorism, permit a § 1605A judgment holder to attach blocked Sudanese assets without a license from OFAC. The government, in previous Statements of Interest, has answered this question in the affirmative.

In *Weininger*, plaintiffs obtained a default judgment against Cuba and sought turnover of funds blocked pursuant to the Cuban Assets Control Regulations, held by a garnishee bank. 462 F. Supp. 2d at 499. The bank petitioned for interpleader relief. In a Statement of Interest filed with the district court, the DOJ indicated that "[i]n the event the Court determines that the funds are subject to TRIA, the funds may be distributed without a license from the Office of Foreign Assets Control." *Id.* (alteration in original) (quoting DOJ Ltr., Jan. 6, 2006).

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[7] In the case of Sudan, there are two relevant provisions that forbid the attachment of blocked assets. *See* 31 C.F.R. § 538.201(a) ("Except as authorized by regulations, orders, directives, rulings, instructions, licenses, or otherwise, no property or interests in property of the Government of Sudan, that are in the United States . . . may be transferred . . . ."); 31 C.F.R. § 538.313 ("The term *transfer* means . . . the issuance, docketing, filing, or levy of or under any judgment, decree, attachment, injunction, execution, or other judicial or administrative process or order, or the service of any garnishment . . . ." (emphasis added)).

Several years later, in the D.C. District Court, the DOJ filed a Statement of Interest that, while primarily addressing a different question, took the position that "when a blocked asset comes within TRIA's scope, TRIA generally overrides OFAC's regulations requiring that a license be obtained before the asset is attached." *Estate of Heiser v. Islamic Republic of Iran*, No. 00-CV-2329, 807 F. Supp. 2d 9 (D.D.C. 2011) (Docket No. 230).

Finally, in a related case, *Bank of Tokyo*, the government yet again reiterated its position in a Statement of Interest filed with the district court. 919 F. Supp. 2d at 422-23. In *Bank of Tokyo*, petitioners were family members and the estates of seventeen Air Force servicemembers killed in the 1996 Khobar Towers bombing in Saudi Arabia, and sought to satisfy the D.C. District Court judgment against the Islamic Republic of Iran by compelling respondent banks in New York to relinquish sanctions-blocked funds. The district court held that petitioners were entitled to attachment of Iran's assets, relying in part on the letter from the U.S. Attorney's Office. The Statement of Interest explicitly noted that the DOJ had previously addressed this issue in another public filing, in *Weininger*, 462 F. Supp. 2d 457. The district court noted that it "is aware of no contrary authority that would require an OFAC license in this instance. It accepts the Statement of Interest's assertion that no OFAC license is required." *Bank of Tokyo*, 919 F. Supp. 2d at 423.

Sudan contends that unlike in *Bank of Tokyo*, the District Court in the instant case did not seek a Statement of Interest before issuing the turnover order. While it is true that the District Court did not explicitly seek a new case-specific Statement from

DOJ, it relied on the persuasive authority of the previous Statements on the issue. In the December 12, 2013, December 13, 2013, and January 6, 2014 turnover orders, the District Court wrote that "[a]n OFAC license is not necessary to disburse these funds and no notice is necessary to the Sudanese agencies and instrumentalities." J. App. at 67, 73, 78 (citing *Bank of Tokyo*, 919 F.Supp. 2d at 422; *Heiser v. Islamic Republic of Iran*, 807 F.Supp. 2d at 23; *Weininger*, 462 F.Supp. 2d 457).

Sudan points to no authority that requires a court to seek a new Statement of Interest in every case in which this issue arises. Unless or until the United States changes its position, the *Weininger* and *Heiser* Statements of Interests represent the government's clear intent to exempt TRIA judgment holders from sanctions regime OFAC licensure requirements. Because we find that the District Court properly relied on the *Weininger* and *Heiser* letters, we need not reach appellees' alternative argument for affirmance, that as a matter of law, even without recourse to a Statement of Interest, an OFAC license is unnecessary to distribute blocked assets to a TRIA judgment holder. *See, e.g.*, *Rubin v. Islamic Republic of Iran*, 709 F.3d 49, 54 (1st Cir. 2013) ("TRIA thereby allows a person to circumvent the normal process for attaching assets that are blocked under a sanctions program, which entails obtaining a license from OFAC.").

Once a district court determines that blocked assets are subject to the TRIA, those funds may be distributed without a license from OFAC. Plaintiffs in this case obtained an underlying § 1605A terrorism judgment from the D.C. District Court and properly domesticated that judgment in the Southern District of New York, asserting a right to execute against

Sudan's assets pursuant to the TRIA and 28 U.S.C. § 1610(g). The turnover orders then properly issued.

CONCLUSION

For the foregoing reasons, the orders of the district court are

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed 3/30/12]

Civil Action 10-1689 (RCL)

RICK HARRISON, et al.,

Plaintiffs,

v.

REPUBLIC OF SUDAN,

Defendant.

ORDER AND JUDGMENT

In accordance with the Memorandum Opinion issued this day, it is hereby

ORDERED that final judgment is entered in favor of plaintiffs and against defendant;

ORDERED that plaintiffs are awarded $78,676,474 in compensatory damages and $236,029,422 in punitive damages, for a total award of $314,705,896 to be distributed as follows:

	Economic	Pain and Suffering	Solatium	Punitive	Total
Aaron Toney	196,040	1,500,000	0	5,088,120	6,784,160
Carl Wingate	198,365	5,000,000	0	15,595,095	20,793,460
David Morales	248,108	2,000,000	0	6,744,324	8,992,432
Edward Love	279,613	2,000,000	0	6,838,839	9,118,452
Eric Williams	553,253	3,000,000	0	10,659,759	14,213,012
Gina Morris	562,577	1,500,000	0	6,187,731	8,250,308
Jeremy Stewart	515,627	7,500,000	0	24,046,881	32,062,508
Kesha Stidham	873,104	5,000,000	0	17,619,312	23,492,416
Margaret Lopez	52,594	7,500,000	0	22,657,782	30,210,376
Martin Songer	509,174	2,000,000	0	7,527,522	10,036,696
Rick Harrison	286,083	5,000,000	0	15,858,249	21,144,332
Robert McTureous	901,936	5,000,000	0	17,705,808	23,607,744
John Buckley III	0	7,500,000	0	22,500,000	30,000,000
Keith Lorenson	0	5,000,000	0	15,000,000	20,000,000
Rubin Smith	0	5,000,000	0	15,000,000	20,000,000
Shelly Songer	0	0	1,000,000	3,000,000	4,000,000
Lisa Lorenson	0	0	4,000,000	12,000,000	16,000,000
Andy Lopez	0	0	4,000,000	12,000,000	16,000,000

and it is further

ORDERED that plaintiffs shall, at their own cost and consistent with the requirements of 28 U.S.C. § 1608(e), send a copy of this Order and Judgment, and the Memorandum Opinion issued this date, to defendants.

SO ORDERED.

Signed by Royce C. Lamberth, Chief Judge, on March 30, 2012.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed 03/30/12]

Civil Action 10-1689 (RCL)

RICK HARRISON, et al.,
Plaintiffs,

v.

REPUBLIC OF SUDAN,
Defendant.

MEMORANDUM OPINION

This case arises out of the bombing of the U.S.S. Cole ("the Cole") on October 12, 2000. The attack ripped a thirty-two-by-thirty-six-foot hole in the side of the vessel when it was berthed in Yemen's Aden Harbor. Seventeen servicemen and women were killed, and forty-two suffered injuries. The eighteen plaintiffs before this Court are fifteen former sailors who were injured while on the Cole and three of their spouses, who, although not on the Cole during the attack, allegedly suffered emotional distress upon learning of the incident.[1] Plaintiffs bring this action under the "state-sponsored terrorism" exception to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330,

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[1] Since the filing of this lawsuit, one plaintiff, Rubin Smith, has died. After his claim was severed, his spouse, as administrator of his estate and upon motion, rejoined the case [Dkt. #34].

1602 *et seq.*[2] Plaintiffs allege that defendant Republic of Sudan ("Sudan") is liable for their injuries by virtue of its support of Al Qaeda, which perpetrated the Cole bombing. Before the Court is [Dkt # 14] plaintiffs' motion for a default judgment against Sudan. After making pertinent findings of fact, the Court concludes that plaintiffs have provided sufficient evidence to establish a cause of action against Sudan under FSIA's state-sponsored terrorism exception, that Sudan is liable to the plaintiffs for the alleged harms, and that plaintiffs are entitled to both compensatory and punitive damages. In accordance with these findings and conclusions, the Court awards damages to plaintiffs.

I. BACKGROUND

A. Prior and Current USS Cole Litigation.

Two cases involving the Cole attack relate to the case at bar and speak to the question of Sudan's liability for the Cole attack. In *Rux v. Republic of Sudan* fifty-seven survivors of the seventeen sailors who died in the Cole attack sued Sudan for damages. *Rux v. Republic of Sudan*, 2005 WL 2086202 (Aug. 26, 2005). After defaulting, Sudan moved to dismiss plaintiffs' claims on jurisdictional and immunity grounds. The district court denied Sudan's motion, concluding that plaintiffs had alleged sufficient jurisdictional facts to bring their case within the FSIA state-sponsored terrorism exception. *Id.* Sudan appealed. The United States Court of Appeals for the Fourth Circuit affirmed the district court, finding that plaintiffs' allegations

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[2] This provision which was enacted as part of the 2008 National Defense Authorization Act ("NDAA"). Pub. L. No. 110-181, § 1083, codified at 28 U.S.C. § 1605A. It creates a "federal right of action against foreign state." *Simon v. Republic of Iran*, 529 F. 3d 1187, 1190 (D.C. Cir. 2008).

met FSIA's jurisdictional pleading requirements "by describing how Sudan provided Al-Qaeda a base of operations to plan and prepare for the bombing, and provided operational support for the attack." *Rux v. Republic of Sudan*, 461 F.3d 461, 473–74 (4th Cir. 2006). The district court then proceeded to the merits of plaintiffs' claims and concluded that, even though Sudan was liable for plaintiff's injuries, plaintiffs were only entitled to damages under the Death on the High Seas Act (DOHSA), 46 U.S.C. § 30302. The Court held that "[w]hile the FSIA vests jurisdiction in federal courts to hear cases against foreign states, it does not afford plaintiffs with a substantive cause of action." 495 F. Supp. 2d 541, 555 (E.D. Va 2007). Accordingly, the district court dismissed plaintiffs' maritime and state law claims and awarded eligible plaintiffs $ 7,956,344 under DOHSA. *Id.* at 567–69. Plaintiffs appealed the district court's judgment. While this appeal was pending, Congress passed the 2008 NDAA amendment to the FSIA which, in addition to creating a federal private right of action, added punitive damages and solatium as recoverable damages in a new section of the FSIA, § 1605A. *See* 28 U.S.C. § 1605A(c). Under this provision, the same fifty-seven *Rux* plaintiffs filed a second lawsuit in August 2010, joining with two new plaintiffs to the case. *Kumar v. Republic of Sudan*, 2011 WL 4369122 (E.D. Va. Sept. 19, 2011). The same district court that heard *Rux* considered and rejected the claims of the plaintiffs to whom it had awarded judgments in the previous litigation, reasoning that both *res judicata* and the prohibition on legislative reopening of final judgments barred them. *Id.* at *10–11 (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 241 (1995)). The court therefore awarded damages only to the new plaintiffs who had not

been party to the previous *Rux* litigation. *Id.* at *11.[3] Plaintiffs in the case at bar were not plaintiffs in *Rux* or *Kumar*.

The Court underscores an important matter before proceeding: because plaintiffs in this case bring their action under the new § 1605A, they are entitled to types of damages—i.e. for pain and suffering and solatium—and punitive damages that the *Rux* plaintiffs, who initiated their action before § 1605A was enacted, did not obtain. As the Court will explain below, these new damages can amount to substantially larger sums than the *Rux* court awarded those plaintiffs. The Court regrets this disparity and emphasizes that the difference primarily reflects a change in the governing statute rather than this Court's assessment of the relative hardship endured by the *Rux* plaintiffs and the plaintiffs currently before the Court.

B. Plaintiffs' Claims Before This Court

Plaintiffs effected service of the complaint, summons, and notice of suit on Sudan by mail. *See* 28 U.S.C. § 1608(a)(3). Sudan accepted service on November 17, 2010. Return of Service/Affidavit, Nov. 23, 2010 [Dkt. # 11]. Under § 1608(d) of the FSIA, this service obligated Sudan to serve and answer or other responsive pleading within 60 days after service. 28 U.S.C.

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[3] The Court respectfully disagrees with the *Kumar* court's application of *res judicata* to bar plaintiffs' claims. For purposes of that doctrine, this Court is not persuaded that there is a meaningful distinction between the procedural posture of the *Kumar* plaintiffs and that of the plaintiffs in *In re Islamic Republic Iran Terrorism Litigation* where this Court concluded that *res judicata* did not preclude claims filed under § 1605A even though they had been litigated under § 1605(a)(7). *In re Islamic Republic of Iran Terrorism Litigation*, 659 F. Supp. 2d 31, 84–85 (D.D.C. 2009).

§ 1608(d). It failed to do so. On January 19, 2011 plaintiffs obtained entry of default from this court. Clerk's Entry of Default, Jan. 19, 2011 [Dkt. # 13]. Plaintiffs now move for a default judgment [Dkt. # 14]. To date, Sudan has not served an answer or any other responsive pleading.

II. LEGAL STANDARDS

A. Default Judgment

The FSIA states that a court shall not enter a default judgment against a foreign state "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S. C. § 1608(e); *Roeder v. Islamic Republic of Iran*, 333 F. 3d 228, 232 (D.C. Cir. 2003). This standard mirrors that applied to entry of default judgment against the United States in Federal Rule of Civil Procedure 55(d).[4] *See Hill v. Republic of Iraq*, 328 F. 3d 680, 684 (D.C. Cir. 2003). FED. R. CIV. PROC. 55(d).

In considering motions for default judgment, a court may accept as true the plaintiffs' "uncontroverted evidence," *Wachsman v. Islamic Republic of Iran*, 603 F. Supp. 2d 148, 155 (D.D.C. 2009) including proof by affidavit. *See Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 83–85 (D.D.C. 2010). On September 21, 2011 an evidentiary hearing was held before the Honorable Henry H. Kennedy, Jr.[5] During that hear-

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[4] Rule 55(d) provides: "no default [judgment] shall be entered against the United States . . . unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." FED. R. CIV. P. 55 (d).

[5] Courts are not required to hold an evidentiary hearing, *see Bodoff v. Islamic Republic of Iran*, 424 F. Supp. 2d 74, 78 (D.D.C.

ing, the Court accepted evidence in form of depositions, affidavits, expert testimony, and original documentary evidence. Reviewing these submissions, this Court will determine whether or not the evidence is sufficiently "satisfactory" to prove Sudan's liability and the damages that plaintiffs seek. 28 U.S.C. § 1608(e).[6]

B. Jurisdiction and Immunity

To state a viable claim, plaintiffs must first demonstrate that this Court has jurisdiction to hear the claims they assert and that Sudan is not entitled to immunity from suit. The FSIA is the "sole basis of jurisdiction over foreign states in our courts." *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 39 (D.D.C. 2009). While foreign sovereigns enjoy general immunity from suit in U.S. courts, FSIA § 1605A establishes a waiver provision that is conditioned on a number of factors. Specifically, a foreign state is not immune from suits in which the following factors are met: (1) money damages are sought (2) against that state for (3) personal injury or death that (4) was "caused by" (5) an act of torture, extrajudicial killing . . . or the provision of material support of resources for such an act if such act or provision of material support or resources is engaged in by an official, employee or agent of such foreign state while acting within the scope of his or her office, employment or agency." 28 U.S.C. § 1605(A)(a)(1); *accord Owens v. Republic of Sudan*, 2011 WL 5966900, at *17 (D.D.C.

2006), but typically do so as a matter of custom and acknowledgment of the defendants' sovereign status.

[6] This case was reassigned to the undersigned judge on November 4, 2011 after Judge Kennedy's retirement. I have carefully reviewed all of the evidence presented to Judge Kennedy.

Nov. 11, 2011).[7] Because plaintiffs in this case do not allege torture or extrajudicial killing, only the "material support" provision is relevant to the case at bar. With regard to § 1605A's causation requirement, in this Circuit there must be "some reasonable connection between the act or omission of the defendant and the damages which the plaintiff has suffered." *Valore*, 700 F. Supp. 2d 52, 66 (internal quotations omitted).

Furthermore, the FSIA provides that courts "shall hear a claim" under § 1605A of the FISA if (1) the foreign state was designated as a state sponsor of terrorism at the time the act occurred; (2) the claimant was a United States national, a member of the armed forces, or otherwise an employee or contractor of the Government of the United States, acting within the scope of her employment and (3) the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim, provided that the act occurred in the foreign state against which the claim is brought. 28 U.S.C. § 1605(A)(a)(2). Combined, these § 1605A(a)(1) and (a)(2) factors determine the Court's jurisdiction over the present case and whether Sudan has effectively waived its immunity from suit. To resolve these threshold questions, the Court first makes relevant findings of fact, as discussed below.

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[7] "[T]he defendant bears the burden of proving that the plaintiff's allegations do not bring its case within a statutory exception to immunity." *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) (citing *Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1002 (D.C. Cir.1985) and *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1171 (D.C. Cir. 1994)); *Owens v. Republic of Sudan*, 412 F. Supp. 2d 99, 94 (D.D.C. 2006) (citing *Phoenix* and stating "sovereign immunity is in the nature of an affirmative defense.").

C. Cause of Action and Theory of Liability

After establishing jurisdiction, plaintiffs must also advance a theory of recovery that is supported by the evidence presented to the court. When a state is subject to suit under an exception to immunity, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." *Id.* § 1606.

Section 1605A(c) of the FSIA creates an explicit "private right of action," which, when read in concert with §1605A(a)(1), establishes the requirements for a viable claim. *Id.* §1605A(a)(1). Courts have interpreted the FSIA-created cause of action to require plaintiffs to prove a theory of liability under which defendants cause the alleged injury or death. *Valore*, 700 F. Supp. 2d at 73; *see also Rimkus v. Islamic Republic of Iran*, 750 F. Supp. 2d 163, 176 (D.D.C. 2010). Plaintiffs must supply the elements of each specific claim—in this case, assault, battery, and intentional infliction of emotional distress ("IIED"). Because the statute is silent as to these elemental requirements, courts in this district apply principles of law found in the Restatement of Torts and other leading treatises. *See, e.g.*, *Valore*, 700 F. Supp. 2d at 76; *In re Islamic Republic of Iran Terrorism Litigation*, 659 F. Supp. 2d at 60 n.19; *Heiser v. Islamic Republic of Iran* (*Heiser II*), 659 F. Supp. 2d 20, 24 (D.D.C. 2009); *see also Bettis v. Islamic Republic of Iran* 315 F.3d 325, 333 (D.C. Cir. 2003) ("[F]ederal courts in FSIA . . . cases have accepted § 46 of the Restatement (Second) of Torts as a proxy for state common law of intentional infliction of emotional distress"). Having established the applicable law and evidentiary requirements, the Court now reviews the evidence and makes findings of fact.

III. FINDINGS OF FACT

A. Judicial Notice of Facts Found in Other Courts

As a preliminary matter, the Court must determine whether or not it will take judicial notice of findings made in *Rux*, as plaintiffs request [Dkt. #26]. As discussed above, both the district court and the Fourth Circuit concluded in that litigation that plaintiffs had alleged sufficient facts as to Sudan's material support of Al Qaeda and the Cole attack and that the country was therefore not immune from suit. *Rux*, 495 F. Supp. 2d at 554 (citing and reaffirming *Rux v. Sudan*, 461 F.3d at 467–75 (E.D. Va 2006); *Rux*, 461 F.3d at 473–74.[8] The district court then proceeded to find that, as a matter of fact, Sudan had provided such support and was liable for plaintiffs' harm. *Rux*, 495 F. Supp. 2d at 556.

Courts in this district have taken judicial notice of related FSIA proceedings and findings of fact made therein. *See, e.g.*, *Estate of Doe v Islamic Republic or Iran*, 808 F. Supp. 2d 1 (D.D.C. 2011) (taking judicial notice of facts found in *Dammarell v. Islamic Republic of Iran*, 2006 WL 2583043 (D.D.C. Sept. 7, 2006) which

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[8] Sudan appeared in these earlier proceedings. It filed a motion to dismiss, which was denied on August 26, 2005. *Rux*, 495 F. Supp. 2d at 543. On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the Eastern District of Virginia's ruling. Subsequently, counsel for Sudan notified the Eastern District that they would not defend nor participate in the proceeding on the merits. A clerk default was entered, and the matter proceeded to trial. *Id.* Counsel for Sudan attended trial but did not participate other than to make a brief closing statement regarding damages. *Id.* Based upon the evidence submitted at trial, judgment was entered against Sudan on July 25, 2007. *Id.* at 566–69.

found Iran had provided material support to Hizbollah for the attack on the U.S. Embassy in Beirut); *Brewer v. Islamic Republic of Iran*, 664 F. Supp. 2d 43 (D.D.C. 2009) (taking notice of the same for *Wagner v. Islamic Republic of Iran*, 172 F. Supp. 2d 128, 132 (D.D.C. 2001)); *Taylor v. Islamic Republic of Iran*, 811 F. Supp. 2d 1,6–7 (D.D.C. 2011) (taking notice of facts found in *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46 (D.D.C. 2003), which found Iran provided material support for the 1984 bombing of the U.S. Marine barracks)). Indeed, "[t]he statutory obligation found in § 1608(e) was not designed to impose the onerous burden of re-litigating key facts in related cases arising out of the same terrorist attack," *Rimkus v. Republic of Iran*, 750 F. Supp. 2d 163, 172 (D.D.C. 2010). Thus, when a court has found facts relevant to a FSIA case involving material support to terrorist groups, courts in subsequent, related cases may "rely upon the evidence presented in earlier litigation . . . without necessitating the formality of having that evidence reproduced." *Taylor*, 811 F. Supp. 2d at 7.

At the same time, taking *notice* of another court's finding of fact does not necessarily denote *adoption* or *finding* of that fact. Indeed, just as "findings of fact made during this type of one-sided hearing should not be given a preclusive effect," *Weinstein v. Islamic Republic of Iran*, 175 F. Supp. 2d 13, 20 (D.D.C. 2001), they also "should not be assumed true beyond reasonable dispute." *Murphy v. Islamic Republic of Iran*, 740 F. Supp. 2d 51, 58–59 (D.D.C. 2010). Moreover, because "default judgments under the FSIA require additional findings than in the case of ordinary default judgments," *Weinstein*, 175 F. Supp. 2d at 19–20, the Court "should endeavor to make such additional findings in each case." *Murphy*, 740 F. Supp. 2d at 59.

Therefore, taking judicial notice of the facts established by the *Rux* court, does not conclusively establish the facts found in *Rux* for, or the liability of the defendants in, this case. Based on this judicial notice of evidence presented in earlier, similar cases "courts may reach their own independent findings of fact." *Anderson v. Islamic Republic of Iran*, 753 F. Supp. 2d 68, 75 (D.D.C. 2010). As a result, employing this FSIA-specific approach to judicial notice-taking of prior proceedings, the Court grants plaintiffs' motion to take judicial notice of the findings of fact in *Rux* [Dkt. # 26], reviews the relevant evidence, and makes its own findings of fact and conclusions of law. Turning to the facts presented and noticed, the Court finds the following:

1. The USS Cole Bombing[9]

At approximately 8:30 a.m. on October 12, 2000, the Cole entered the Port of Aden, Yemen, to temporarily stop for refueling. The ship began refueling at approximately 10:31 a.m. At approximately 11:10 a.m., a small boat manned by two drivers pulled up parallel to the ship. Seconds later, the boat exploded.

The explosion occurred between approximately 11:15 and 11:18 a.m., just as some of the crew was sitting down for lunch. The blast ripped a large hole in the port side of the ship, and the main engine room, auxiliary machine room, and a storeroom were flooded. Smoke, dust, and fuel vapors filled the air. Several chambers were structurally destroyed. As discussed

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[9] This section is based on a Navy report cited in *Rux*: Investigation to Inquire Into the Actions of USS Cole (DDG 67) In Preparing For And Undertaking a Brief Stop For Fuel at Bandar at Tawahi (Aden Harbor) Aden, Yemen, On Or About 12 October 2000. *See Rux*, 495 F. Supp. 2d at 544 n.12 (citing report). The report describes the attack and its aftermath, and the Court summarizes relevant portions here.

above, the blast and its after-effects killed seventeen navy sailors, and forty-two others were injured.

2. Sudan's Support of the USS Cole Bombing[10]

a. Sudan and Al Qaeda

Since 1993, the United States has designated Sudan as a state sponsor of terrorism. 58 Fed. Reg. 52523-01 (Oct. 8, 1993); U.S. Department of State, State Sponsors of Terrorism, available at http://www.state.gov/j/ct/c14151.htm (last visited March 22, 2012). During the 1990s, Hassan Abdallah Turabi, head of the Sudanese political party and leader of the Muslim Brotherhood and the National Islamic Front ("NIF"), transformed Sudan into a centralized, Islamic state that supported movements and organizations with militant Islamic ideologies. Exs. 80 at 12 & 81 at 18-19.

As is well-known today, Al Qaeda is a worldwide terrorist network. Ex. 81 at 29:4-7. Founded by Osama Bin Laden in approximately 1990, Ex. 22, it has organized, executed or inspired acts of terrorism around the world that killed or injured thousands of innocent people, including the September 11, 2001 attacks on the United States. Exs. 28 & 74 at 70.

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[10] In determining whether Sudan provided material support and assistance to Al Qaeda in perpetrating the attack on the Cole, the Court accepts the deposition testimony from three experts including: Lorenzo Vidino, a Research Program Manager at the Jebsen Center for Counter-Terrorism Studies at The Fletcher School of Tufts University, Ex. 78; James Woolsey, the director of the Central Intelligence Agency from 1993 to 1995, Ex. 79; and Steve Emerson, Executive Director of The Investigative Project on Terrorism and an expert on Islamic extremist networks. Ex. 77. The Court accepts each as an expert witness on terrorism, the relationship between Al Qaeda and Sudan, and the material support Sudan provided to Al Qaeda for the Cole bombing.

According to the U.S. State Department, Bin Laden relocated to Sudan from Afghanistan in 1991, where he was welcomed by Turabi. Ex. 17. Turabi and Bin Laden shared a common extremist ideological and religious outlook. Bin Laden agreed to help Turabi in the regime's ongoing war against African Christian separatists in southern Sudan, and also to invest his wealth in the poor country's infrastructure. Exs. 81 at 21–23 & 74 at 57. In exchange, Sudan provided Bin Laden's fledgling terrorist group with a sanctuary within which it could freely meet, organize, and train militants for operations. Ex. 80 at 13:3–14:7. In 1996, he was expelled from the country under international pressure and returned to Afghanistan. Exs. 23 & 74 at 57, 109. Both before and after this departure, the effects of Sudan's support of Al Qaeda were substantial.

b. Joint Business Ventures

Bin Laden established several joint business ventures with the Sudanese regime that began to flourish upon his arrival in the Sudanese capital of Khartoum in 1991. Ex. 17. Bin Laden formed symbiotic business relationships with wealthy NIF members by undertaking civil infrastructure development projects on the regime's behalf. *Id.* These included Al-Hijrah for Construction and Development, Ltd., which built the Tahaddi road between Khartoum and Port Sudan on the Red Sea coast, as well as a modern international airport near Port Sudan; Wadi al-Aqiq Company, Ltd., which, dealt in gum, corn, sunflower, and sesame products; and Al-Themar al-Mubarak-ah Agriculture Company, Ltd., which acquired large tracts of land near Khartoum and in eastern Sudan. Exs. 17 & 32 at 239, 241. These businesses provided income to Al

Qaeda, as well as cover for the procurement of explosives, weapons, and technical equipment, and for the travel of Al Qaeda operatives. Exs. 24 & 74 at 57–58. Bin Laden continued to maintain his substantial business interests and facilities in Sudan even after his departure to Afghanistan in 1996. Exs. 23 & 82 at 26-27.

c. Banking Support

Sudan allowed its banking institutions to be used by Al Qaeda to launder money. Ex. 81 at 25. Indeed, Bin Laden and wealthy members of the NIF capitalized Al-Shamal Islamic Bank in Khartoum; Bin Laden personally invested $50 million in the bank. Exs. 17 & 32 at 332. In the late 1980s, Sudan adopted an Islamic banking system that forbids interest and lacks the rigorous accounting standards used by Western banking systems. Ex. 81 at 36. The lack of scrutiny associated with this system was ideal for Al Qaeda because it allowed the group to move large sums of money in support of its operations without detection. Exs. 81 at 52 & 80 at 15. Douglas Farah, former reporter for the Washington Post in West Africa and author of the book "Blood From Stones: The Secret Financial Network of Terror," Ex. 76, asserted in a written deposition, that Sudan "provided [Al Qaeda] fundamentally with a banking structure, Islamic structure that's out of the norm of the banking rules that we're acquainted with in the west, and allowed them channels to move money through that would be virtually undiscoverable to the outside world." Ex. 80 at 14-15, 26. He further stated that Al Qaeda "couldn't have operated with that degree of freedom and openness if they had not been sanctioned by the central government to do so." *Id.*

d. Training and Direct Finance of Terrorist Groups

Starting in the early 1990s, Turabi and the Sudanese regime convened annual conferences in Sudan under the label Popular Arab and Islamic Conference. Ex. 80 at 26:13–27:15; Ex. 82 at 19:16-20:22. At these conferences, Bin Laden and other top leaders and operatives from the most violent Islamic terrorist organizations congregated to exchange information and plan terrorist activities. Exs. 74 at 61 & 81 at 26. Although the conference was closed down in approximately 2000, Sudan continued to be used as a safe haven by Al Qaeda and other terrorist groups. Ex. 35.

In addition, as reported by the U.S. Department of State in its annual "Patterns of Global Terrorism" reports, the Sudanese military cooperated with Bin Laden and Al Qaeda to finance at least three terrorist training camps in northern Sudan. Ex. 17. As well, each year from 1997 through 2000, Sudan served as a meeting place, safe haven, and training hub for Al Qaeda and other terrorist groups including Lebanese Hizballah, Palestinian Islamic Jihad, Abu Nidal Organization, and Hamas. *See* Exs. 22; 25; 28; 35. Most of the groups maintained offices and other forms of representation in the capital, using Sudan primarily as a secure base for organizing terrorist operations and assisting compatriots elsewhere." Exs. 25 & 28. Moreover, Ayman Al-Zawahiri, a top-ranking member of Al Qaeda, reached an agreement in 1998 with Sudan's national Islamic groups to establish budgets to finance terror operations. Ex. 81 at 43:9–44:4. Bin Laden's construction company worked directly with Sudanese military officials to transport and provision the camps, where terrorists of Egyptian, Algerian, Tunisian, and Palestinian origin received training. *Id.*

Sudan's support of Al Qaeda continued after Bin Laden's 1996 departure until at least the Cole bombing. Ex. 80 at 12:11–23. As of 1999, this assistance consisted of "paramilitary training, money, religious indoctrination, travel, documents, safe passage, and refuge." As of 2000 support "included the provision of travel documentation, safe passage, and refuge." Ex. 28.

e. Diplomatic Cover

As early as 1998, Sudan provided Al Qaeda members with Sudanese diplomatic passports, diplomatic pouches, and regular Sudanese travel documentation that facilitated the movement of Al Qaeda operatives in and out of the country. Exs. 22, 25, 35, 53, 81 at 31; 83 at 28. Diplomatic passports allow the holder to pass through airport security in airports and ports around the world without her bags being checked and without the same level of scrutiny or searches normally given to regular passport holders. Exs. 80 at 17; 81 at 32. A diplomatic passport typically lasts between five and ten years. Ex. 81 at 33. Thus, the passports issued in 1998 would not have expired prior to 2003. *See id.* Diplomatic pouches enjoy diplomatic immunity from search or seizure. Al Qaeda agents with these passports and pouches were therefore able to enter and leave Sudan and cross borders in other countries carrying materials to prepare for attacks without arousing suspicion. Exs. 82 at 19; 81 at 33; 83 at 31; 80 at 14. Indeed, it was critical to Al Qaeda's method of training its operatives in one country and then dispatching them with their materials to other countries to carry out operations or await instructions. Ex. 83 at 25:5–26:5; Ex. 83 at 31:9–32:1. By providing such cover to Al Qaeda, Sudan enabled the terrorist organization to transport weapons and munitions outside

the country and into other countries undetected by customs agents. Exs. 82 at 25; 80 at 18.

f. Sudan's Connection to the Cole Attack

While receiving support from Sudan, Al Qaeda prepared the strike against the Cole. The attack was part of a decade-long plan conceived and executed by Bin Laden and Al Qaeda to confront U.S. interests in the Middle East. Ex. 72 at 29. Bin Laden supervised the Cole plot directly. Ex. 74 at 190. As stated in the 9/11 Commission Report, Bin Laden "chose the target and location of the attack, selected the suicide operatives, and provided the money needed to purchase explosives and equipment." *Id.* Mr. Emerson and Mr. Vidino both testified that the attack's "mastermind" was Qaed Salim Sinan al-Harethi, also known as Ali Qaed Sinan Harthi, who was one of Bin Laden's bodyguards. Exs. 81 at 45–46; 83 at 33. They further assert that Al-Harethi was trained by Al Qaeda in Sudan in the 1990s before being dispatched to Yemen where, according to Mr. Vidino, he became "the chief of operation[s] of Al Qaeda in Yemen." Ex. 81 at 46.

In addition to training, Sudan was "more likely than not" the source of the explosives used in the Cole bombing, according to CIA Director Woolsey. Ex. 82 at 46. Mr. Emerson testified, "I have no doubt the source [of the explosives used on the Cole] came from Al Qaeda and was transported to Yemen from Al Qaeda or by the Sudanese government through most probably the diplomatic pouch." Ex. 80 at 18–19. Mr. Farah testified that his "best guess" as to the source of the explosives used in the Cole, based on his "studied opinion and having discussed this case with intelligence officials," is Sudan, "which was the closest place to Yemen in which they had the safe quarter in which to be able to move this type of goods across the border."

Ex. 80 at 18–19. As well, according to Mr. Emerson, the explosives used in the Cole attack were sent by Al Qaeda operatives in Sudan. Ex. 83 at 25:20–26:5. In criminal proceedings arising out of the 1998 embassy bombings, one of Bin Laden's lieutenants in Sudan, Jamal Al-Fadl, corroborated this fact when he testified against Bin Laden. Ex. 32, *U.S. v. Bin Laden*, 397 F. Supp. 2d 465 (S.D.N.Y 2005), Case No. 98-cr-1023, Trial Tr. Feb. 6, 2001. Specifically, Mr. Al-Fadl stated under oath that he worked under Bin Laden in Sudan; that he stored four crates of weapons and explosives at a farm in Sudan owned by Bin Laden; and that he shipped the four crates in an Al Qaeda-owned boat from a facility owned by the Sudanese military in Port Sudan to Yemen, where they were to be used to "fight the Communists." Ex. 32 at 262, 336–40.

In sum, the evidence suggests that Sudan provided Al Qaeda with the support, guidance, and resources that allowed it to transform into a sophisticated, terrorist network, and that such support was critical to Al Qaeda developing the expertise, networks, military training, munitions, and financial resources necessary to plan and carry out the Cole attack. Ex. 83 at 25:5–28:14. As Mr. Woolsey testified, "[t]he proximity of Sudan to Yemen, the need for a protected logistics infrastructure, the confused situation in the Government of Yemen at the time . . . , the amount of explosives that needed to be put in the boat that attacked the Cole, all that suggests to me that the logistical support and base of operations that could have been available in Sudan could have been of substantial assistance to an attack in Yemen, such as the one that occurred." Ex. 82 at 29. He summarized: the Cole attack "might have been possible, but it would not have been as easy" without Sudan's support. *Id.* In addition, Mr. Vidino stated that the bombing would

have been "close to impossible" without Sudan's assistance because "simply all they needed, starting from the training to the explosives, to all what a terrorist cell needs, even the ideological aspect of it, came from Sudan. It was clearly necessary to have all these things in place to carry out an operation such as the attack on the Cole." Ex. 81 at 47–48. In addition, Mr. Emerson asserted that the Cole attack would not have occurred without Sudan. Ex. 157 at 34. According to Emerson, by removing Sudan's support, "[y]ou would have deprived them of the oxygen needed to operate." *Id.* Moreover, Mr. Farah testified that he did not think the bombing of the Cole could have happened "without the active support of the Government of Sudan . . . from 1992 through the Cole bombing, Sudan provided an incredibly necessary and vital infrastructure for Al-Qaeda to be able to prepare and move the explosives and carry out the attacks on the Cole. And it was not clandestine or hidden presence, but rather fairly overt and knowing presence by senior members of the NIF government in Sudan." Ex. 80 at 14, 27–30.

In light of the submitted reports, testimony, and other uncontroverted evidence, the Court finds that Sudan provided material support to Al Qaeda such that the terrorist organization could attack the Cole. The conforms to the findings of the *Rux* court, discussed above. With this fact established, the Court now turns to the uncontested evidence plaintiffs have submitted on the nature and extent of their injuries.

B. Plaintiffs' Injuries

1. Plaintiffs on the Cole During the Attack

Plaintiffs who were on the Cole during the attack, each allege assault, battery and IIED. They claim injuries in the form of post-traumatic stress, lost

physical abilities, and anguish, and they seek compensatory and punitive damages. Each individual's claim is explained in more detail below.

Rick Harrison

Rick Harrison was born on January 30, 1962, in Cut Bank, Montana. Ex. 92 at 6:24-7:6. On January 19, 1982, Mr. Harrison enlisted in the Navy. Ex. 92 at 7:15-17. He intended to remain in the Navy as a career. Ex. 92 at 7:23-8:17. In July 1999, he was assigned to serve on the Cole as a fire marshal. Ex. 92 at 8:20-24.

At the time of the bombing, Mr. Harrison was on the starboard side of the ship walking past the medical station. Ex. 92 at 15:10-17. He was located approximately 47 feet from the blast. Ex. 92 at 16:13-24. The blast threw him toward the overhead, causing him to strike his head and suffer a concussion. Ex. 92 at 17:14-18:1. Mr. Harrison landed directly on his knees causing severe injuries to his knees, back. The blast also damaged the membranes in his ears. Ex. 92 at 17:14-18:1, 18:22-20:1. Mr. Harrison inhaled toxic smoke in a room where wiring was burning. Ex. 92 at 22:21-23:10. He later developed a lung condition as a result of breathing the toxic smoke. *Id.* Mr. Harrison did not cease his rescue activities for 96 hours. Ex. 92 at 20:15-18, 23:17-24:10.

Upon returning to Naval Station in Norfolk, Virginia, Mr. Harrison's permanent injuries were discovered when he was unable to pass a physical readiness test. Ex. 92 at 24:17-25:15. Mr. Harrison was subsequently diagnosed with the compression of ten lower vertebrae, flattened arches in his feet, damage to the tympanic membrane in his right ear, a separated shoulder and damage to his rotary cuff, and a severe

concussion. Ex. 92 at 19:9-20:1, 25:2-15, 28:13-24. Aside from the physical injuries, he also had recurring nightmares, mood swings, and severe headaches. Ex. 92 at 25:16-25. Ultimately, as a result of his physical and emotional condition, he was medically discharged from the Navy. Ex. 92 at 26:19-27:4. Currently, Mr. Harrison endures constant physical pain in his knees, shoulders, lower back, and feet. Ex. 92 at 28:8-29:7. Mr. Harrison testified that the emotional impact of these injuries is still present today. Ex. 92 at 29:8-31:16. His symptoms include anxiety, anger, flashbacks, and nightmares. Ex. 92 at 31:17-32:23.

Dr. Hernandez-Cardenache an expert clinical psychologist, further provided his expert opinion that Mr. Harrison's symptoms are consistent with chronic post-traumatic stress disorder. Ex. 106 at 36:14-39:4.

Keith Lorensen

Keith Lorensen was born on September 28, 1967, in St. Paul, Minnesota. Ex. 90 at 5:13-16. On October 7, 1985, Mr. Lorensen enlisted in the Navy. Ex. 90 at 6:8-25. He intended to remain in the Navy as his career. Ex. 90 at 12:12-18. In 1998, Mr. Lorensen was assigned to the Cole. Ex. 90 at 14:12-17.

At the time of the attack, Mr. Lorensen was in the chief petty officer's mess, midship on the port side very near to the point of impact, conversing with another crew member. Ex. 90 at 14:24-16:6. The blast flung him 30 feet through the air and caused him to black out. Ex. 90 at 16:7-18:8. When he regained consciousness, he found himself lying across the mess underneath debris from the galley equipment. *Id.* His right femur was broken four inches above the knee and had been completely folded behind his back so that his foot was now located near his head. Ex. 90 at 19:6-20:14.

Mr. Lorensen also sustained multiple contusions on each of his legs, a lip laceration, and a broken wrist in the blast. Ex. 90 at 18:15-20:25, 30:13-31:9. After noticing bleeding from his right leg, he used his belt as a tourniquet to stop the bleeding from his femoral artery, and continued applying the pressure until, after approximately 40 minutes, he was removed from the space by other sailors. Ex. 90 at 18:9-20:14.

After being removed from the mess hall, Mr. Lorensen was given morphine and taken to the top of the ship with other injured sailors. Ex. 90 at 22:18-23:4. While waiting for additional medical treatment, Mr. Lorensen witnessed a fellow sailor being declared dead. Ex. 90 at 23:5-15. He was then taken to a hospital in Yemen for further treatment. Ex. 90 at 27:11-18. He blacked out again in the hospital and only regained consciousness after surgery had been performed on his broken leg. Ex. 90 at 29:1-6. When he awoke, his leg was in traction, with makeshift metal components affixed to open wounds in his leg held in place by a piece of concrete attached via twine as a counterweight. Ex. 90 at 30:13-31:16. The laceration in his lip was subsequently stitched without any anesthesia. *Id.*

The next day he was flown to Germany where he received further medical treatment before ultimately returning to Virginia. Ex. 90 at 32:13-21. After returning to the United States, seven months passed before he could put any weight on his right leg. Ex. 90 at 40:10-41:16. He can no longer squat down and has lost range of motion in his right leg. Ex. 90 at 43: 21-44:7. In addition to physical injuries, Mr. Lorensen also sustained psychological damage as a direct result of the incident. Ex. 90 at 46:1-4. Specifically, he experienced increased irritability and could not sleep through the night for a number of years. Ex. 90 at 46:5-

48:17. Mr. Lorensen also experienced flashbacks and emotional outbursts. *Id.* He was subsequently diagnosed with post traumatic stress disorder. Ex. 90 at 46:1-17. The Department of Veterans Affairs has assigned him a 40% disability rating. Ex. 90 at 60:16-61:1.

Dr. Rene Hernandez-Cardenache provided his expert opinion that Mr. Lorensen's symptoms are consistent with chronic post-traumatic stress disorder. Ex. 106 at 74:6-79:21.

John Buckley III

John Buckley III was born on August 10, 1979. Ex. 99 at 4:18-21. He enlisted in the Navy on May 28, 1997, Ex. 99 at 5:7-8, intending to remain in the service for the duration of his career. Ex. 99 at 5:15-21. Prior to the terrorist attack, he had been serving on the Cole for approximately three years. Ex. 99 at 6:18-21.

At the time of the bombing, Mr. Buckley was in a passageway approximately ten feet from the point of impact. Ex. 99 at 12:25-13:3. The explosion flung him through the air to the other end of the passageway, where he had a concussion and lost consciousness. Ex. 99 at 13:4-18. After coming to, Mr. Buckley moved toward the area of the blast in an effort to assist injured sailors. Ex. 99 at 13:22-14:17. Mr. Buckley assisted in the medical care and evacuation of other injured sailors for several hours, until he collapsed due to his own injuries. *Id.*

As a result of the blast, Mr. Buckley suffered fractures to both knees, hearing loss, and severe lower back trauma. Ex. 99 at 8:25-10:13. Mr. Buckley continues to suffer from his physical injuries. Ex. 99 at 9:25-10:3. He cannot lift over 100 pounds, has undergone

two back surgeries, and continues to receive treatment for his knee injuries. *Id.*; Ex. 99 at 17:16-18:7. Mr. Buckley has also been diagnosed with post-traumatic stress disorder. Ex. 99 at 8:25-10:13. He continues to experience nightmares and headaches, is prone to aggressive behavior, and hears voices. Ex. 99 at 19:3-12. On May 29, 2001, Mr. Buckley was honorably discharged from the Navy. Ex. 99 at 7:13-25. Mr. Buckley was assigned a 100% disability rating by the VA. Ex. 99 at 8:14-21.

According to Dr. Hernandez-Cardenache, Mr. Buckley's symptoms are consistent with post-traumatic stress disorder. Ex. 106 at 21:17-25:5.

Margaret Lopez

Margaret Lopez was born on December 26, 1970. Ex. 96 at 6:14-16. She enlisted in the Navy. Ex. 96 at 7:6-7. It was Mrs. Lopez's intention to remain in the Navy as a career. Ex. 96 at 7:10-16. In July 1998, Mrs. Lopez was assigned to the Cole as a gas turbine systems mechanic. Ex. 96 at 10:23-11:8.

At the time of the bombing, Mrs. Lopez was supervising work being performed in the oil lab. Ex. 96 at 14:12-22. The bomb blast impacted the ship approximately 20 feet from her location and immediately killed one of the sailors working with her in the oil lab at that time. Ex. 96 at 15:21-16:13. As a direct result of the blast, Mrs. Lopez sustained burns to her face, neck, legs, and arms; her ear drums were ruptured; and several discs in her spine were ruptured. Ex. 96 at 19:25-20:13. After the blast, the oil lab began to fill with smoke and water. Ex. 96 at 16:25-17:14, 18:8-18. In order to escape the area, she freed herself from debris and jumped into the sea through the hole created by the blast. Ex. 96 at 18:20-25. She remained

in the water for over an hour before being pulled to safety. Ex. 96 at 21:8-19.

Mrs. Lopez was transferred to a hospital in Yemen before being sent to Germany for further treatment. Ex. 96 at 23:15-24:7. She remained in Germany for two weeks under the care of a burn specialist. Ex. 96 at 24:11-18. While waiting to get a skin graft, Mrs. Lopez developed pneumonia. Ex. 96 at 24:19-25:1. It took approximately two years for her burns to fully heal. Ex. 96 at 25:25-26:15. Mrs. Lopez also underwent an eardrum replacement surgery. *Id.* Since the bombing, Mrs. Lopez has experienced insomnia, mood swings and nightmares, and has been diagnosed with post-traumatic stress disorder. Ex. 96 at 34:5-20; 29:9-30:7.

As a result of her medical condition, Mrs. Lopez retired from the Navy on November 4, 2004. Ex. 96 at 27:3-28:1. At the time, she was prescribed antidepressants and pain medication for her injuries. Ex. 96 at 29:9-30:7. Based upon her injuries, she has been assigned a 100% disability rating by the Department of Veterans Affairs. Ex. 96 at 30:25-31:15.

Dr. Rene Hernandez-Cardenache testified that Mrs. Lopez's symptoms are consistent with chronic post-traumatic stress disorder. Ex. 106 at 59:6-61:25.

Edward Love

Edward Love was born on October 4, 1979. Ex. 94 at 5:16-19. He enlisted in the Navy on March 30, 2000, Ex. 94 at 6:4-5, intending to spend his career in the Navy. Ex. 94 at 17:22-25. His first assignment was onboard the Cole, which began in approximately August 2000. Ex. 94 at 6:8-10.

When the attack occurred, Mr. Love was midship on the port side. Ex. 94 at 8:12-14. As a result of the blast,

he was thrown to the ground and suffered a ruptured eardrum. Ex. 94 at 8:22-9:8. Mr. Love immediately began to assist the injured crew and to repair damage to the ship to prevent further flooding. Ex. 94 at 9:17-10:25. In doing so, he witnessed many sailors who were severely injured or had died because of the attack. *Id.*

After three or four hours, Mr. Love left the ship and was transferred to the hospital in Yemen. Ex. 94 at 10-21. The next day, Mr. Love was moved to Germany where he received further treatment. Ex. 94 at 14:2-12. Since that day, Mr. Love has not been able to pass a hearing test for his right ear. Ex. 94 at 14:13-19. The VA has assigned a 10% disability rating for this injury. Ex. 94 at 14:20-24. After returning to the United States, Mr. Love was stationed at a naval base in Norfolk, Virginia. Ex. 94 at 16:16-25.

While stationed in Norfolk, Mr. Love was diagnosed with post traumatic stress disorder. Ex. 94 at 17:2-9. The lasting effects from the bombing have caused Mr. Love's personality to change, with symptoms including problems with anxiety, mood swings, lack of appetite, and trouble sleeping. Ex. 94 at 18:18-23. As a result of these continuing issues, on March 3, 2003, he was discharged from the Navy. Ex. 94 at 17:10-21. Mr. Love continues to receive treatment for his symptoms to this day. Ex. 94 at 19:14-20:25.

According to Dr. Hernandez-Cardenache, Mr. Love's symptoms are consistent with chronic post-traumatic stress disorder and co-morbid mood disorder. Ex. 106 at 62:1-65:4.

Robert McTureous

Robert McTureous, born on May 25, 1972, Ex. 89 at 5:13-16, enlisted in the Navy. Ex. 89 at 5:23-24. It was his intention to have a career in the Navy. Ex. 89 at 5:25-6:5. In August 2000, Mr. McTureous joined the crew of the Cole. Ex. 89 at 9:11-24.

On the day of the attack, Mr. McTureous was in the oil lab, with Margaret Lopez, preparing to relieve other sailors who were involved in the refueling process. Ex. 89 at 13:2-14. The blast occurred in close proximity to the oil lab, and the room began to fill with water. Ex. 89 at 13:20-15:8. Because the exit door of the oil lab had been damaged by the blast, Mr. McTureous escaped by climbing through the wreckage and jumping through the hole in the ship that had been caused by the explosion. *Id.*; Ex. 89 at 16:3-16.

After being rescued from the water by his shipmates, Mr. McTureous was taken to a hospital in Yemen where he remained overnight until being transferred to Germany and then Portsmouth Naval Hospital for further treatment. Ex. 89 at 18:5-19:13. After the bombing, Mr. McTureous was discharged from the Navy because he could not face "the reality of going back to sea." Ex. 89 at 23:18-24:4.

As a result of the blast, Mr. McTureous sustained severe, permanent, painful, life long injuries including two ruptured eardrums, second degree burns on his face, a fractured finger and shrapnel in his arms. Ex. 89 at 15:5-8, 20:4-13, 24:5-25:11. Currently, Mr. McTureous has significant hearing loss in both ears. Ex. 89 at 25:8-11. Due to his physical injuries, the Department of Veterans Affairs has assigned him a 70% disability rating. Ex. 89 at 25:12-15, 39:14-40:6.

In addition to severe physical injuries, Mr. McTureous was diagnosed with post-traumatic stress disorder in 2002. Ex. 89 at 26:21-29:5. The psychological effect of the blast has caused Mr. McTureous to suffer from flashbacks, nightmares, and a fear of crowds. *Id.*; Ex. 89 at 30:8-37:15. Prior to the bombing, Mr. McTureous was outgoing, but now describes himself as reserved, scared, on edge, and shy. Ex. 89 at 27:16-22.

Dr. Rene Hernandez-Cardenache testified that Mr. McTureous' symptoms are consistent with chronic post-traumatic stress disorder and reduced cognitive functioning as a result of the attack. Ex. 106 at 25:6-28:1.

David Morales

David Morales was born on February 19, 1978 and enlisted in the Navy in July 1999. Ex. 93 at 6:8-12. It was his intention to remain in the Navy for his career. Ex. 93 at 6:20-25. After graduating from basic training, Mr. Morales was assigned to the Cole as a boatswain's mate. Ex. 93 at 6:16-25.

On the day of the bombing, Mr. Morales had just finished his morning duties and had gone to his room to rest. Ex. 93 at 14:17-15:1. He was lying in his rack approximately 30 feet from the point of impact when he felt the explosion rock the ship. Ex. 93 at 15:10-25. The force of the blast caused him to impact the ceiling above his rack and then fall to the floor. *Id.* He immediately went to the top of the ship to assist his injured shipmates, encountering many severely injured and dead sailors on his way. Ex. 93 at 16:3-25:21. In the rescue efforts, Mr. Morales attempted to perform CPR on a fellow sailor who ultimately died. *Id.* Mr. Morales was later commanded to stand

security on the deck, which he did for the next three days. *Id.*

As a result of the blast, Mr. Morales suffered whiplash in his neck. Ex. 93 at 26:8-27:4. Three weeks after the incident he was diagnosed with post-traumatic stress disorder, and continues be treated for this condition to this day. Ex. 93 at 28:6-29:18, 33:5-8. Mr. Morales' symptoms include irritability, nervousness and anxiety, and flashbacks. Ex. 93 at 36:8-39:5. His condition caused Mr. Morales to be discharged from the Navy in 2002. Ex. 93 at 10:19-22, 11:18-24.

Dr. Rene Hernandez-Cardenache provided his expert opinion that Mr. Morales's symptoms are consistent with post-traumatic stress disorder. Ex. 106 at 33:14-36:13.

Gina Morris

Gina Morris was born on October 15, 1980. Ex. 88 at 3:22-25. She enlisted in the Navy in 1998. Ex. 88 at 4:13-18. She intended to remain in the Navy for her career. Ex. 88 at 4:24-5:1. The Cole was her first assignment. Ex. 88 at 5:15-17.

At the time of the attack, Ms. Morris was on the inside of the ship moving towards the oil lab. Ex. 88 at 7:22-8:2. Immediately upon hearing the explosion, she went toward the oil lab to help her shipmates who had been injured in the blast. Ex. 88 at 7:22-10:9. For over five hours, Ms. Morris assisted in the medical treatment of sailors injured in the blast. *Id.* Ms. Morris then left the ship to escort injured sailors to a hospital in Yemen. *Id.*

Although she did not sustain any physical injuries, Ms. Morris has suffered severe emotional distress as a direct result of the attack. Ex. 88 at 10:10-19:22. Upon

going to the aid of her shipmates, Ms. Morris witnessed the horrific aftermath of the bombing. Ex. 88 at 8:24-10:9. Ms. Morris left the Navy, in August 2001, as a direct result of the attack. Ex. 88 at 23:1-11. She is currently undergoing treatment for her ongoing symptoms including anger, sleep issues, high anxiety, flashbacks and guilt. Ex. 88 at 10:10-19:22.

Dr. Hernandez-Cardenache testified that Ms. Morris' symptoms are consistent with post-traumatic stress disorder. Ex. 106 at 65:5-67:24.

Rubin Smith

Rubin Smith was born on July 26, 1979, in Albemarle, North Carolina. Deposition of Tracey Smith, ("D.E. 36"), Supplemental Proposed Findings of Fact ("Supp. Ex. 1") at 6:21-7:3. In 1997, Mr. Smith enlisted in the Navy. D.E. 36, Supp. Ex. 1 at 7:16-18. Mr. Smith loved his experience in the Navy and only left the Navy because of the trauma he experienced in the bombing of the U.S.S. Cole. Supp. Ex.1 at 14:2-22.

In October 2000, Mr. Smith was serving onboard the U.S.S. Cole as an operations specialist. D.E. 36, Supp. Ex. 1 at 8:1-13. At the time of the bombing, Mr. Smith was assigned to work in the ship's galley, which was near the epicenter of the blast. D.E. 36, Supp. Ex. 1 at 10:1-16. However, a shipmate, who was a close friend, volunteered to take his shift. *Id.* Mr. Smith's friend was in the galley as Mr. Smith's replacement at the time of the explosion and was killed. *Id.* Mr. Smith was in his quarters at the time and was thrown from his bunk to the deck by the force of the blast. The fall caused him to dislocate his ankle and suffer a torn tendon and nerve damage in his lower leg. D.E. 36, Supp. Ex. 1 at 11:20-25. As a result of his injuries, Mr. Smith was evacuated from the ship to a military

treatment facility. D.E. 36, Supp. Ex. 1 at 11:3-8. Mr. Smith suffered scarring as a result of his injuries and received treatment for ongoing pain up until the time of his death. D.E. 36, Supp. Ex. 1 at 11:9-10 and 22; 13:19-23.

As a result of the blast, Mr. Smith suffered severe emotional distress, which caused him to develop post-traumatic stress disorder. D.E. 36, Supp. Ex. 1 at 12:1-13. For the rest of his life, Mr. Smith was plagued by feelings of guilt over the death of the shipmate who had volunteered to take his shift in the galley and other friends who were also lost onboard. D.E. 36, Supp. Ex. 1 at 10:10-16. His symptoms, which included depression and anger, resulted in problems with maintaining personal relationships. D.E. 36, Supp. Ex. 1 at 14:9-15; 16:10-18. In 2003, Mr. Smith, who believed that he was no longer emotionally capable of serving, was discharged from the Navy. D.E. 36, Supp. Ex. 1 at 14:9-15; 7:19-21.

Mr. Smith was diagnosed with post-traumatic stress disorder and was receiving psychological treatment at the time of his death. D.E. 36, Supp. Ex. 1 at 14:9-15; 16:10-18. As a result of his physical and mental injuries, Mr. Smith was assigned a 50% disability rating by the Department of Veterans Affairs. D.E. 36, Supplemental Ex. 2 at 2.

Martin Songer, Jr.

Martin Songer was born on August 3, 1970. Ex. 102 at 4:24-5:4. On June 11, 1991, Mr. Songer enlisted in the Navy. Ex. 102 at 6:19-22. In 1998, Mr. Songer was assigned to the Cole as a Second Class Boatswain Mate. Ex. 102 at 10:7-24. At the time of the bombing, Mr. Songer was in the boatswain workshop in the aft part of the ship on the port side, approximately 150

feet away from the area of direct impact. Ex. 102 at 17:8-23. The blast threw Mr. Songer against a bulkhead. Falling equipment bruised and lacerated him. Ex. 102 at 19:11-19. Mr. Songer witnessed many dead and severely injured shipmates. Ex. 102 at 23:16-24:3, 25:20-27:9.

These events impacted Mr. Songer emotionally. Ex. 102 at 23:16-24:3, 25:20-27:9. As a direct result of the bombing, he now suffers from anxiety and temper control issues. Ex. 102 at 34:7-12. A few months after the terrorist attack, Mr. Songer decided to leave the Navy. Ex. 102 at 34:20-35:5.

Dr. Hernandez-Cardenache further provided his expert opinion that Mr. Songer's symptoms are consistent with moderate to severe emotional distress. Ex. 106 at 71:10-73:22.

Jeremy Stewart

Jeremy Stewart was born on March 5, 1981. Ex. 95 at 5:7-10. He enlisted in the Navy on February 9, 2000. Ex. 95 at 7:21-23. It was Mr. Stewart's intention to remain in the Navy for the full duration of his career. Ex. 95 at 5:25-6:4. Two weeks after he completed basic training, Mr. Stewart was assigned to the Cole as a Hull Maintenance Technician Fireman. Ex. 95 at 7:4-20.

When the bomb exploded, Mr. Stewart was thrown to the ground and suffered a concussion, losing consciousness for five to fifteen minutes. Ex. 95 at 9:12-10:18. He was removed from the debris by other sailors, taken to the flight deck on the top of the ship, and evacuated to a hospital in Yemen. Ex. 95 at 10:25-11:2. He again lost consciousness and did not come to until approximately one week later, after having been transported to Germany. Ex. 95 at 11:3-7.

As a result of the blast, Mr. Stewart suffered multiple fractures and shattered bones in his arms and legs, a gastric rupture, internal bleeding, and shrapnel wounds. Ex. 95 at 10:19-24. His injuries caused permanent scarring on his forearms, knees, legs, and stomach. Ex. 95 at 11:8-14. He is no longer able to run and has lost range of motion in his right shoulder, and endures constant pain on a daily basis. Ex. 95 at 11:15-20, 13:5-11. As a result of the attack, Mr. Stewart also exhibits a variety of emotional symptoms, including sadness, flashbacks, nightmares, irritability, and high anxiety. Ex. 95 at 15:13-16:12, 17:21-23:8. In December 2003, the Navy discharged Mr. Stewart was discharged due to his injuries. Ex. 95 at 13:14-14:4. The Department of Veterans Affairs assigned Mr. Stewart a 60% disability rating. Ex. 95 at 11:21-24.

According to Dr. Hernandez-Cardenache, Mr. Stewart's symptoms are consistent with post-traumatic stress disorder and a traumatic brain injury. Ex. 106 at 39:7-41:25.

Kesha Stidham

Kesha Stidham was born on June 12, 1981. Ex. 100 at 4:2-5. She enlisted in the Navy in July 1999, Ex. 100 at 4:18-21, and intended to remain in the Navy for her career. Ex. 100 at 6:22-24. Ms. Stidham was assigned to the Cole on October 30, 1999. Ex. 100 at 5:20-22.

The center of the explosion was approximately 50 or 60 feet away from her location. Ex. 100 at 8:23-9:5. Several sailors standing within only a few feet of her were killed by the blast. Id. The explosion caused Ms. Stidham to be thrown back ten feet through the air. Ex. 100 at 9:6-10:3. She suffered large thigh and leg bruises, fractured ribs, burns to her neck, and deep lacerations to her cheek, jawline, chin, and right ear.

Id. She was initially treated for her injuries on the vessel. Ex. 100 at 11:24-12:19. She saw other sailors injured and lying on the deck, some covered in soot, and others screaming in pain. *Id.*

After being transported off the Cole, Ms. Stidham was taken to a hospital in Yemen. Ex. 100 at 15:8-18. Ms. Stidham received 15 stitches in her face without anesthesia. Ex. 100 at 15:19-16:24. She described the pain of the stitching as tremendous. Ex. 100 at 16:4-10. Ms. Stidham had to undergo re-stitching of the wounds on her face in Germany. Ex. 100 at 17:12-15, 18:6-19:1.

Upon returning to the U.S., Ms. Stidham was placed on leave for 30 days, then returned to service on the U.S.S. Whitney. Ex. 100 at 23:9-12, 25:23-26:5. While onboard, she suffered an anxiety attack. Ex. 100 at 26:17-27:23. She was ultimately removed from the ship, placed on limited duty and discharged from the Navy. Ex. 100 at 31:6-12, 32:24-33:24. The Department of Veterans Affairs has given her a 40% disability rating due to her injuries. Ex. 100 at 54:18-22.

Ms. Stidham received psychological treatment for her emotional distress caused by the attack and was diagnosed with post-traumatic stress disorder. Ex. 100 at 28:4-22. Her symptoms, such as anger and anxiety, have resulted in problems with maintaining personal relationships and employment. Ex. 100 at 33:20-35:1, 37:5-38:2. Ms. Stidham still experiences panic attacks on a daily basis. Ex. 100 at 42:23-43:9.

Dr. Rene Hernandez-Cardenache provided his expert opinion that Stidham's symptoms are consistent with chronic post-traumatic stress disorder and panic disorder as a result of the attack. Ex. 106 at 28:2-33:13.

Aaron Toney

Aaron Toney was born on March 21, 1979 and enlisted in the Navy on December 23, 1997. Ex. 105 at 7:8-10. It was Mr. Toney's intention to remain in the Navy as his career. Ex. 105 at 7:17-22. In April 1998, Mr. Toney was assigned to the Cole as a fireman recruit. Ex. 105 at 9:1-13.

At the time of the bombing, Mr. Toney had just been relieved from his post in the engine room when he heard a loud explosion. Ex. 105 at 13:2-10. Mr. Toney immediately changed into his firefighting ensemble. Ex. 105 at 13:11-14:15. As he moved around the ship, he witnessed severely injured and dead sailors. *Id.* For 72 hours, Mr. Toney was involved in the medical care of his fellow shipmates. Ex. 105 at 17:22-20:8. Mr. Toney also assisted in repairing the damage to the ship for three weeks after the incident, and was among the last of the crewmembers to leave the vessel. Ex. 105 at 20:20-21:9.

Although Mr. Toney was not physically injured in the bombing, he has been diagnosed with post traumatic stress disorder. Ex. 105 at 23:18-24:23. His symptoms include difficulty sleeping, nightmares, memory problems, anxiety, and feelings of emptiness and distrust. Ex. 105 at 30:4-22, 36:16-37:21, 40:2-41:21, 44:11-48:17, 49:21-58:25. These symptoms ultimately caused him to leave the Navy. Ex. 105 at 28:18-29:14. He has been assigned a 30% disability rating by the Department of Veterans Affairs. Ex. 105 at 61:19-62:12.

Eric Williams

Eric Williams was born on November 12, 1980. Ex. 98 at 4:13-15. On June 16, 1999, he enlisted in the Navy. Ex. 98 at 5:3-6. It was Mr. Williams' intention

to remain in the Navy as his career. Ex. 98 at 7:14-22. In 2000, Mr. Williams was assigned to the Cole as a Tomahawk technician. Ex. 98 at 8:13-9:13. His duties included maintenance and operation of the Tomahawk missile system. *Id.*

At the time of the bombing, Mr. Williams was eating in the mess hall, in the center of the ship. Ex. 98 at 9:25-11:13. The explosion occurred directly adjacent to his location. *Id.* Shrapnel from the explosion lacerated the top of his head, which caused him to suffer a concussion and drift in and out of consciousness. *Id.* After the explosion, he witnessed sailors die from their injuries and others who had been severely injured. Ex. 98 at 18:3-23. Mr. Williams was able to move to the top of the ship, and assisted in the treatment and evacuation of other injured sailors until he again fell unconscious. Ex. 98 at 21:7-22:6. Mr. Williams was then removed to a hospital in Yemen where he received stitches for the wound to his head. Ex. 98 at 23:3-12. In the U.S., he was diagnosed with a severe concussion. Ex. 98 at 29:20-24, 33:4-9. To this day, Mr. Williams has trouble remembering events from his childhood. Ex. 98 at 33:10-23. The bombing continues to have a profound effect on Mr. Williams. Mr. Williams has been diagnosed with severe post-traumatic stress disorder and has experienced nightmares, extreme anger, and issues maintaining relationships, symptoms which he did not experience prior to the bombing. Ex. 98 at 69:13-75:21. For several years, he struggled with alcohol abuse. Ex. 98 at 35:13-36:13, 40:15-44:4, 46:2-48:2, 50:1-51:16, 54:13-56:19, 67:1-24.

Dr. Hernandez-Cardenache provided expert opinion that Mr. Williams' symptoms are consistent with chronic post-traumatic stress disorder and anxiety disorder. Ex. 106 at 42:5-50:7.

Carl Wingate

Carl Wingate was born on April 15, 1979. He enlisted in the Navy in August 31, 1998, Ex. 101 at 7:7-9, 8:20-24, intending to stay in the Navy for the remainder of his career. Ex. 101 at 7:10-17.

At the time of the bombing, Mr. Wingate was in his rack. Ex. 101 at 10:16-23. The impact of the blast caused him to be thrown from his rack and land on his head and shoulder. *Id.* Shortly thereafter, he made his way to the top of the ship and began assisting in the medical treatment of sailors injured in the blast and the transport of injured sailors from the ship to mainland. Ex. 101 at 10:24-12:13. Mr. Wingate provided medical attention to eleven injured sailors, two of which died. *Id.* One of the sailors who died was his bunkmate. *Id.*

As a result of the bombing, Mr. Wingate suffered impingement of both shoulders, herniated discs in his back, hearing loss, memory loss, and post-traumatic stress disorder. Ex. 101 at 13:8-21. Since the bombing, the physical effects of Mr. Wingate's injuries have become progressively more severe. Ex. 101 at 14:1-16:16. He continues to experience significant pain in his shoulders, neck, and back, and his range of motion is limited. *Id.* Post-traumatic stress disorder symptoms include irritability, anxiety, flashbacks, and nightmares. Ex. 101 at 30:11-33:1, 33:19-37:6. The emotional damage from the bombing has caused his personal relationships to suffer and led to a divorce from his wife. Ex. 101 at 21:7-22:3. In 2007, Mr. Wingate was discharged from the Navy as a result of the injuries he sustained from the bombing. Ex. 101 at 19:16-25, 20:21-21:6. The Department of Veterans Affairs assigned him a 60% disability rating. Ex. 101 at 19:2-5.

According to Dr. Hernandez-Cardenache, Mr. Wingate's symptoms are consistent with post-traumatic stress disorder. Ex. 106 at 50:8-55:5.

2. Plaintiffs Who are Spouses of Plaintiffs on the Cole During the Attack

Spouses of the injured sailors allege IIED and injury in the form of mental anguish and loss of consortium. They seek punitive and compensatory damages, including loss of solatium. Their claims include the following individualized injuries.

Andy Lopez

Andy Lopez is the spouse of Margaret Lopez, Ex. 97 at 5:2-6, and a former Navy master chief. Ex. 97 at 5:7-11. He married Margaret Lopez on November 8, 1996. Ex. 97 at 6:19-20. Mr. and Mrs. Lopez have two children together. Ex. 97 at 7:9-14.

On the day of the bombing, Mr. Lopez learned of the attack on the Cole from the morning news. Ex. 97 at 8:6-15. At noon that day, the Navy officially informed him of the incident and asked him to proceed to a local naval base for further information. Ex. 97 at 8:16-18. Mr. Lopez did not learn that his wife survived the blast until the next day when he spoke with her on the telephone. Ex. 97 at 9:3-19. Mr. Lopez immediately flew to meet her in Germany, where she was being treated under the care of a burn specialist. Ex. 97 at 9:23-10:4. When he arrived, Mrs. Lopez was in a medically–induced coma. He stayed there with her until her return to the United States. Ex. 97 at 10:13-11:8, 12:4-21.

The bombing and resultant injuries to his wife have affected Mr. Lopez psychologically. Ex. 97 at 17:14-18:22. Indeed, he has been diagnosed with post-

traumatic stress disorder and has entered into counseling. Ex. 97 at 18:23-19:19. Dr. Hernandez-Cardenache, testifies that Mr. Lopez's symptoms are consistent with chronic post-traumatic stress disorder. Ex. 106 at 55:15-59:5.

Lisa Lorensen

Lisa Lorensen is the spouse of Keith Lorensen, a sailor who was injured during the bombing of the Cole. Ex. 91 at 6:12-13. She was married to Mr. Lorensen on October 23, 1993. Ex. 91 at 6:14-15. The Lorensens have two children together. Ex. 91 at 6:16-20. Although Mrs. Lorensen was not enlisted in the Navy, she served as the Ombudsman of the Cole, serving as a liaison between the families and the commanding officer of a ship. Ex. 91 at 6:21-23.

On the day of the bombing, Mrs. Lorensen received a phone call advising her that something significant had occurred on the ship. Ex. 91 at 11:3-12:11. However, no specific details were provided. *Id.* She was advised to proceed to a naval facility in order to obtain more information. *Id.* While on her way to the location, Ms. Lorensen received a phone call from her mother advising her that the Cole had been attacked. *Id.* While waiting at the facility, Ms. Lorensen witnessed the Naval officers present at the location advising sailors' family members of the death or injuries suffered by their relatives. *Id.* After approximately twelve hours, she was advised that Keith Lorensen was alive, but injured. Ex. 91 at 13:19-14:15:5.

Approximately 24 hours later, Mrs. Lorensen had the opportunity to speak with her husband. Ex. 91 at 15:6-21. Mr. Lorensen told her that he did not know whether he would be able to walk again, but would be coming home. Ex. 91 at 15:19-16:4. Mrs. Lorensen

then flew to Germany to see her husband. Ex. 91 at 16:5-14. When they returned to Virginia, Mrs. Lorensen had tremendous feelings of guilt and sadness as a result of her husband's injuries and the death and injury of the other sailors on the vessel. *Id.* The emotional impact of the events caused a strain in their marriage. Ex. 91 at 20:9-21:15.

Dr. Rene Hernandez-Cardenache, an expert clinical psychologist, further provided his expert opinion that Mrs. Lorensen suffered from acute emotional distress as a direct result of the bombing. Ex. 106 at 79:22-82:3.

Shelly Songer

Shelly Songer is the spouse of plaintiff Martin Songer, who was injured during the bombing of the Cole. Ex. 103 at 5:7-9. Mrs. Songer learned of the bombing through a telephone call from her mother-in-law. Ex. 103 at 8:23-9:2. Twelve hours later, she learned that her husband survived the bombing. Ex. 103 at 9:6-15. Upon returning home, the continuing emotional effect of the terrorist attack on Mr. Songer has adversely affected their marriage. Ex. 103 at 13:4-15:16.

Dr. Hernandez-Cardenache testifies that Ms. Songer's symptoms are consistent with severe emotional distress. Ex. 106 at 67:25-71:9.

IV. CONCLUSIONS OF LAW

A. Jurisdiction is Proper and Sudan Is Not Immune from Suit

The Court finds that the plaintiffs have met FSIA's multi-factor test for jurisdiction and waiver of immunity discussed above, as set forth above. *See* 28 U.S.C. § 1605(A)(a)(1); *Owens*, 2011 WL 5966900, at *17. First, the sole remedy plaintiffs seeks is "money

damages." 28 U.S.C. § 1605(A)(a)(1). Second, Sudan is a foreign state. *Id.* Third, the evidence presented to the Court establishes that plaintiffs suffered physical injury form the attack. *Id.* Fourth, the evidence presented shows that Sudan aided Al Qaeda in executing the bombing, and this harm was a direct result of Sudan's of provision of material support. *Id.* On the evidence presented, there is "some reasonable connection between the act or omission of the defendant and the damages which the plaintiff has suffered." *Valore*, 700 F. Supp. 2d at 66 (internal quotations omitted).

As well, FSIA section 1605A(a)(2) requirements have been met. Sudan has been designated a state sponsor of terrorism since 1993, and claimants are all U.S. nationals, both statutory requirements. 28 U.S.C. § 1605A(a)(2).[11] Thus, for purposes of this action, FSIA does not protect Sudan with immunity from suit, and this Court has jurisdiction over plaintiffs' claims.

B. Plaintiffs Have Established a Cause of Action and Theory of Liability

The same facts as to material support and causation support plaintiffs' cause of action and theory of liability. Plaintiffs have shown that Sudan's support of Al Qaeda has a "reasonable connection" to the damages they suffered. *Id.* As described in detail below, they also demonstrate the other elements of the torts they allege. *See Murphy*, 740 F. Supp. 2d at 72. In keeping with the prevailing approach in this Circuit, *see id.*;

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[11] As for the § 1605A(a)(2)(A)(iii) arbitration requirement, plaintiffs were not required to extend an offer to arbitrate because the FSIA only requires as much when the alleged terrorist act occurred in the foreign state against which the claim is brought. *Id.* Even though the attack did not take place in Sudan, the plaintiffs sent Sudan an offer, to which it did not respond. *See* Notice of Amended Offer to Arbitrate, Oct. 11, 2010 [Dkt. # 6].

Bettis, 315 F.3d at 333, the Court apply the generally accepted principles of tort law. The Court addresses first the claims of the sailors who were on the Cole at the time of the attack and then the claims of their spouses who were not present during the attack.

1. Harm to Plaintiffs Injured on the Cole

a. Assault

Sudan is liable to plaintiffs for the assault they allege if, when it provided material support to Al Qaeda, (1) it acted "intending to cause a harmful contact with . . . , or an imminent apprehension of such a contact" by, those attacked and (2) those attacked were "thereby put in such imminent apprehension." RESTATEMENT (SECOND) OF TORTS § 21(1); *accord Murphy*, 740 F. Supp. 2d at 73 (citing *Valore*, 700 F. Supp. 2d at 76). Here, the record shows that Sudan acted with intent to cause harmful contact and the immediate apprehension thereof: acts of terrorism are, by their very nature, intended to harm and to terrify by instilling fear of further harm. Accepting these plaintiffs' uncontroverted assertions that they did, in fact, fear such harm because of the attack, the Court concludes that Sudan is liable for assault.

b. Battery

Likewise, Sudan is liable for battery. It acted "intending to cause a harmful or offensive contact with . . . , or an imminent apprehension of such a contact" by, those attacked and (2) "a harmful contact with" those attacked "directly or indirectly result[ed]." RESTATEMENT (SECOND) OF TORTS § 13; *accord Murphy*, 740 F. Supp. 2d at 74 (citing *Valore*, 700 F. Supp. 2d at 76). Harmful contact is that which results in "any physical impairment of the condition of another's body, or physical pain or illness." RESTATEMENT (SECOND) OF TORTS

§ 15. Accepting plaintiffs' uncontroverted assertions that they did, in fact, suffer physical injury from the attack on the Cole, the Court concludes Sudan is liable to certain plaintiffs for battery.

c. Intentional Infliction of Emotional Distress

Sudan is liable for IIED if it (1) "by extreme and outrageous conduct" (2) "intentionally or recklessly" (3) "causes severe emotional distress to another." RESTATEMENT (SECOND) OF TORTS § 46(1). Further, "if bodily harm to the other results from it, for such bodily harm." *Id.* Here, plaintiff-sailors have proven each element. In the FSIA-terrorism context, courts have held that "[a]cts of terrorism are by their very definition extreme and outrageous and intended to cause the highest degree of emotional distress." *Belkin v. Islamic Republic of Iran*, 667 F. Supp. 2d 8, 22 (D.D.C. 2009) (citing *Stethem v. Islamic Republic of Iran*, 201 F. Supp. 2d 78, 89 (D.D.C. 2002)). Based on the evidence presented, the Court concludes that Sudan's support of the Cole bombing was both intentional and reckless and caused plaintiffs emotional distress. It is therefore liable to plaintiffs for IIED.

2. Harm to Spouses of Sailors

Spouses of injured sailors have brought IIED claims, alleging that extreme and outrageous conduct directed at their spouses caused these plaintiffs severe emotional distress. According to the second Restatement of Torts, Sudan is liable in these cases under such claims if it (1) engaged in extreme and outrageous conduct (2) which was directed at persons other than plaintiffs (3) which intentionally or recklessly caused severe emotional distress, but not necessarily bodily harm, (4) to such persons' immediate family members—the immediate-family requirement—who were present

at the time such conduct occurred-the presence requirement. *Valore*, 700 F. Supp. 2d at 78 (citing RESTATEMENT (SECOND) OF TORTS § 46(1)–(2)(a)). As the record shows, plaintiff-spouses have proven the first three elements. Although the fourth element appears to prohibit recovery for emotional injury by those not present at the time such conduct occurs, the drafters of the Restatement include a caveat that this Court has interpreted liberally: "'[i]f the defendants' conduct is sufficiently outrageous and intended to inflict severe emotional harm upon a person which is not present, no essential reason of logic or policy prevents liability.'" *Heiser II*, 659 F. Supp. 2d at 27 (quoting DAN B. DOBBS, THE LAW OF TORTS § 307, at 834 (2000)). As the Court noted in *Heisler II*, "[t]errorism, unique among the types of tortious activities in both its extreme methods and aims, passes this test easily." *Id.*; *accord Brewer*, 664 F. Supp. 2d at 47. Therefore, plaintiff-spouses need not have been present at the time of a terrorist attack to recover for severe emotional injuries suffered as a result. Here, accepting the uncontroverted evidence that the plaintiffs named above suffered severe emotional and physical injury as a result of the injuries suffered by their spouses, the Court concludes that Sudan is liable to them for IIED.[12]

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[12] Plaintiffs' also alleged "loss of solatium." Such a claim under the FSIA-terrorism exception is indistinguishable from an IIED claim. *Valore*, 700 F. Supp. 2d at 85 (citing *Heiser II*, 659 F. Supp. 2d at 27 n. 4); *Beer v. Islamic Republic of Iran*, 574 F. Supp. 2d. 1, 13 (D.D.C. 2008). Therefore the Court only considers the IIED claim and awards appropriate damages (also known at "solatium damages") below.

D. Damages

Plaintiffs have stated claims and seek recovery for assault, battery, IIED, and loss of solatium. Section 1605A(c)(4) of the FSIA provides that damages available under the FSIA-created cause of action may "include economic damages, solatium, pain and suffering, and punitive damages." Accordingly, those who survived the Cole attack can recover damages for their pain and suffering, as well as any other economic losses caused by their injuries; family members can recover solatium damages for their emotional injury; and all plaintiffs can recover punitive damages.

"To obtain damages against defendants in an FSIA action, the plaintiff must prove that the consequences of the defendants' conduct were 'reasonably certain (i.e., more likely than not) to occur, and must prove the amount of the damages by a reasonable estimate consistent with this [Circuit's] application of the American rule on damages.'" *Valore*, 700 F. Supp. 2d at 84(citing, *Salazar*, 370 F. Supp. 2d at 115-16); *accord Hill v. Republic of Iraq*, 328 F.3d 680, 681 (D.C. Cir 2003). As discussed above, plaintiffs have demonstrated that Sudan's provision of material support to Al Qaeda was reasonably certain to—and indeed intended to—cause injury to plaintiffs. The Court now estimates the differing amounts of damages sought under the FSIA-created cause of action, based in part on the expert report that plaintiffs submitted as well the framework established by this Court in similar FSIA terrorism cases.

1. Economic Damages

The plaintiffs presented evidence of their lost earning capacity through the testimony and expert reports

of Dana Kaufman, JD, CPA, CFE, a forensic accounting expert accepted by the Court. *See* Ex. 107. Mr. Kaufman's reports provide calculations for the lost earnings of each of the plaintiff-sailors injured in the terrorist attack on the Cole. *Id.* Mr. Kaufman's methodology assumed that each sailor would complete a twenty-year career in the Navy and then retire. Ex. 107 at 29:25-30:22. He did not add any additional lost wages that may have occurred after retirement from the Navy. Ex. 107 at 19:11-20:13. After calculating what each sailor would have earned in the Navy, he subtracted their prospective retirement benefits to reach his conclusion. *Id.* The Court finds that this conservative approach is acceptable. Based upon his calculations, two of the sailors injured in the bombing, Keith Lorensen and John Buckley III, did not suffer any lost earning capacity. Ex. 107 at 26:21-27:11, 25:5-16. Having reviewed Dr. Kaufmans' testimony and reports, the Court finds that the plaintiffs are entitled to receive compensatory damages for the total economic damages. The precise amounts are set forth in the judgment accompanying this opinion.

2. Sailor-Plaintiffs' Pain and Suffering

In addition to economic damages, plaintiffs may be entitled to compensation for the pain and suffering they experienced as a direct result of the Cole bombing. "Damages for surviving victims [of a terrorist attack] are determined based upon an assessment of such factors as 'the severity of the pain immediately following the injury, the length of hospitalization, and the extent of the impairment that will remain with the victim for the rest of his or her life.'" *Valore*, 700 F. Supp. 2d at 83–84 (citing *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 51 (D.D.C. 2007)). "'In awarding pain and suffering damages, the Court

must take pains to ensure that individuals with similar injuries receive similar awards.'" *Id.* "Thus in *Peterson*, the Court granted a baseline award of $5 million to individuals suffering such physical injuries as compound fractures, severe flesh wounds, and wounds and scars from shrapnel, as well as 'lasting and severe psychological pain.'" *Id.* "The Court was willing to depart upward from this baseline to $7.5–$12 million in more severe instances of physical and psychological pain, such as where victims suffered relatively more numerous and severe injuries, were rendered quadriplegic, partially lost vision and hearing, or were mistaken for dead, as was one soldier who 'was placed in a body bag [and] buried alive in a morgue for four days until someone heard him moaning in pain.'" *Id*; *see also Estate of Bland v. Islamic Republic of Iran*, 2011 WL 6396527 (D.D.C. Dec. 21, 2011). Conversely, the Court will depart downward from the $5 million baseline, by an amount of $2-3 million, where victims suffered "minor shrapnel injuries or minor injury from small-arms fire," *Valore*, 700 F. Supp. 2d at 84. As well, when a serviceman suffers severe emotional injury without physical injury, this Court has typically awarded the victim $1.5 million. *See Valore*, 700 F. Supp. 2d at 85; *Bland*, 2011 WL 6396527 at *3. This Court finds that the baseline set forth in *Valore* is appropriate in this case and applies the upward and downward departures below.

Based upon the severity of certain injuries described above, the Court awards the baseline amount of $5 million to the following plaintiffs for their pain and suffering: Rick Harrison, Carl Wingate, Keith Lorenson, Robert McTureous, David Morales, and Rubin Smith. Following the rule on upward departure, the Court awards the following plaintiffs an upward departure to $7.5 million in damages: John Buckley,

Margaret Lopez, and Jeremy Stewart. Finally, the Court departs downward for plaintiffs whose physical injuries were not as severe. Accordingly, Eric Williams is awarded $3 million, and Edward Love and Martin Songer, whose physical injuries were relatively minor, are each awarded $2 million. *See Peterson*, 515 F. Supp. 2d at 54 (departing downward to $2 million where victim "was minimally injured" but "suffered lasting and severe psychological problems.").

Although the remaining plaintiffs, Martin Songer and Gina Morris, did not suffer direct physical injuries as a result of the bombing, they have suffered psychological harm. A downward departure from the baseline of $5 million is also appropriate for these plaintiffs. In accordance with this Court's awards in other cases where plaintiffs on the scene of the attack did not suffer physical harm, Ms. Morris and Mr. Toney are awarded $1.5 million each.

3. Intentional Infliction of Emotional Distress/Solatium to Spouses

In similar actions, this Court held that spouses of surviving servicemembers may be entitled to $4 million in solatium damages (or harm from IIED). *Valore*, 700 F. Supp. 2d at 85 (citing *Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229, 269 (D.D.C. 2006) and referring to the amounts it establishes for solatium damages as a "framework"); *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 52; *cf. Acosta v. Islamic Republic of Iran*, 574 F. Supp. 2d 15, 29 (D.D.C. 2008) ("In determining the appropriate award of damages for solatium, the Court may look to prior decisions awarding damages for intentional infliction of emotional distress as well as to decisions regarding solatium."). This amount is "not set in stone," however, *see Valore*, 700 F. Supp. 2d at 86, and the

Court may adjust it as it sees fit. In *Bland*, for example, this Court held that it is inappropriate for the solatium awards of family members to exceed the pain and suffering awards of the surviving servicemen. *Bland*, 2011 WL 6396527 at *5 ("[T]he Court does not think it appropriate for the . . . spouse to recover more than the victim"). In light of these holdings, the Court applies the baseline amount to the claims of Lisa Lorenson and Andy Lopez (whose spouses are awarded $5 and 7.5 million, respecitvely, for their pain and suffering) and awards them $4 million for the harm they suffered upon learning of the Cole attack and the injuries of their spouses and for the psychological harm they continue to experience as a result of the incident. The Court further finds that downward adjustment is warranted for the solatium damages of Shelly Songer because her spouse, Martin Songer, was awarded $2 million for his pain and suffering. Following *Bland*, the Court awards Mrs. Songer $1 million.

4. Punitive Damages

Having established the compensatory damage awards, the Court now determines whether, and to what extent, it should levy punitive damages against Sudan. Under 28 U.S.C. § 1605A, foreign state sponsors of terrorism may be liable for such damages. *See* 28 U.S.C. § 1605A(c). According to the Second Restatement of Torts, punitive damages are designed to both "punish [a defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future." RESTATEMENT (SECOND) OF TORTS § 908(1) (1977). Further, they "may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." *Id.* Here, the Court finds Sudan's acts

sufficiently outrageous to justify punitive damages. While Sudan's support of Al Qaeda does not rise to level of direct involvement in the attacks, it was nonetheless intentional, material and, as a result, reprehensible. *See Baker*, 775 F. Supp. 2d at 85 (finding that the character of defendant's actions in providing material support and sponsorship to terrorist organization merited award of punitive damages).

In determining the proper punitive award, courts typically consider four factors: "(1) the character of the defendants' act, (2) the nature and extent of harm to the plaintiffs that the defendants caused or intended to cause, (3) the need for deterrence, and (4) the wealth of the defendants." *Flatow*, 999 F. Supp. at 32 (citing RESTATEMENT (SECOND) OF TORTS § 908(1)–(2) (1965)). Synthesizing these factors, courts in similar cases have generated two numbers that, together, determine the punitive damages award: (1) the multiplicand and (2) the multiplier (the factor by which the multiplicand should be multiplied to yield the desired deterrent effect). Depending on the evidence available, the multiplicand is either the magnitude of defendant's annual expenditures on terrorist activities, *see Valore*, 700 F. Supp. 2d at 87–88, or the amount of compensatory damages already awarded, *see Bland*, 2011 WL 6396527, at *6 (using compensatory damages as the multiplicand and 3.44 as the multiplier, based on a ratio set forth in earlier cases). Here, plaintiffs have not presented evidence relating to Sudan's actual expenditures on terrorist activities.[13] The Court will

[13] Citing various publicly availably courses, plaintiffs argue that Sudan benefitted from Bin Laden and Al Qaeda's capital and infrastructure investments, submitting figures on Sudan's gross domestic product, the growth thereof, and annual revenue from oil. After reviewing these figures, the Court concludes that these figures do not indicate what level of punitive damages that would

thus use the compensatory damages value as the multiplicand.

The multiplier has ranged between three and, in exceptional cases, five. *See Haim v. Islamic Republic of Iran*, 784 F. Supp. 2d 1, 13 (D.D.C. 2011); *Valore*, 700 F. Supp. 2d at 88–89. The Court finds no exceptional circumstances here. Contrary to plaintiffs' assertion, Sudan's brief and cursory participation in the *Rux* litigation does not suggest that, at this point in time, its government is more amenable to a deterrent signal from this Court. Therefore, the Court awards plaintiffs three times the compensatory damages in punitive damages, to be distributed in proportion to each plaintiff's share of the compensatory award.

5. Prejudgment Interest

Plaintiffs also request pre-judgment interest. Whether to award such interest is a question that rests within this Court's discretion, subject to equitable considerations. *See Pugh v. Socialist People's Libyan Arab Jamahiriya*, 530 F. Supp. 2d 216, 263 (D.D.C. 2008). "Courts in this Circuit have awarded prejudgment interest in cases where plaintiffs were delayed in recovering compensation for their injuries—including, specifically, where such injuries were the result of targeted attacks perpetrated by foreign defendants." *Baker v. Socialist People's Libyan Arab Jamahirya*, 775 F. Supp. 2d 48, 86 (D.D.C. 2011). The Court finds no delay here. Plaintiffs filed their claim in October 2010. As well, Sudan, having never even appeared in this case, has not prolonged the litigation. Thus, the Court does not find any equitable grounds for

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that would punish or deter Sudan from providing future support to terrorist entities. The Court therefore does not consider them in its damages calculation.

awarding pre-judgment interest. Moreover, because the Court has applied the framework in *Heiser*, to its calculation of solatium damages (as explicitly proposed by plaintiffs), prejudgment interest is not appropriate for these awards. *See Oveissi v. Islamic Republic of Iran*, 768 F. Supp. 2d 16, 30 n.12 (D.D.C. 2011) (concluding that pre-judgment interest was not warranted for solatium damages because the values set by the *Heiser* scale "represent the appropriate level of compensation, regardless of the timing of the attack.").

V. CONCLUSION

For the foregoing reasons, this Court finds Sudan liable for the injuries that plaintiffs suffered and awards damages accordingly. A separate Order and Judgment consistent with these findings shall issue this date.

Signed by Royce C. Lamberth, Chief Judge, on March 30, 2012.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[Filed 12/12/13]

Case No. 1:13-cv-03127 (AT)

RICK HARRISON, JOHN BUCKLEY III, MARGARET LOPEZ, ANDY LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARDS LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, MARTIN SONGER, JR., SHELLY SONGER, JEREMY STEWARD, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE, AND TRACY SMITH, as Personal Representative of the Estate of Rubin Smith,

Plaintiffs,

vs.

THE REPUBLIC OF SUDAN,

Defendant,

vs.

MASHREQBANK PSC,

Respondent.

TURNOVER ORDER AGAINST MASHREQBANK

AND NOW, this 12th day of December, 2013, upon Plaintiffs' Petition for Turnover Order Against Mashreqbank pursuant to 28 U.S.C. § 1610(g), CPLR § 5225(b) and Federal Rule of Civil Procedure 69(a), the Motion is GRANTED. The Court hereby finds and orders as follows:

1. Plaintiffs obtained a judgment in the District Court for the District of Columbia in the amount of $314,705,896, plus interest (the "Judgment"), and the entire principal amount of the Judgment remains unsatisfied.

2. Funds held at Mashreqbank are subject to execution and attachment under the Foreign Sovereign Immunities Act because the owners of the funds are agencies and instrumentalities of the Republic of Sudan.

3. [redacted], also known as [redacted], is an agency and instrumentality of the Sudanese government. The following account, totaling [redacted], plus accrued interest, is subject to execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	Account Owner	Description	Value
[redacted]	[redacted]	[redacted]	[redacted]

4. [redacted] is an agency and instrumentality of the Sudanese government. The following account, totaling [redacted] plus accrued interest, are subject to execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	Account Owner	Description	Value
[redacted]	[redacted]	[redacted]	[redacted]

5. [redacted] is an agency and instrumentality of the Sudanese government. The following account, totaling [redacted] plus accrued interest, execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	Account Owner	Description	Value
[redacted]	[redacted]	[redacted]	[redacted]

6. [redacted], also known as [redacted], is an agency and instrumentality of Sudan. The following account, totaling [redacted], plus accrued interest, is subject to execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	Account Owner	Blocking Date	Value
[redacted]	[redacted]	[redacted]	[redacted]

7. The Court hereby directs Mashreqbank to turn over the proceeds of the foregoing accounts, totaling [redacted] (the "Turnover Assets"), together with any accrued interest, to the Plaintiffs within ten (10) days from the date of this Order.

8. An OFAC license is not necessary to disburse these funds and no notice is necessary to the Sudanese agencies and instrumentalities. *See Heiser v. Bank of Tokyo Mitsubishi UFJ, New York Branch*, 919 F. Supp. 2d 411, 422 (S.D.N.Y. 2013); *Heiser v. Islamic Republic of Iran*, 807 F. Supp. 2d 9, 23 (D.D.C. 2011); *Weininger v. Castro*, 432 F. Supp. 2d 457 (S.D.N.Y. 2006).

9. Upon turnover by Mashreqbank of the Turnover Assets to the Plaintiffs, plus all accrued interest thereon to date, Mashreqbank shall be fully discharged pursuant to CPLR §§ 5209 or 6204 and Rule 22 of the Federal Rules of Civil Procedure, as applicable, and released from any and all liability

and obligations or other liabilities, including all writs of execution, notices of pending action, restraining notices and other judgment creditor process of any kind, whether served on, or delivered to Mashreqbank, to the extent that they apply, purport to apply or attach to the Turnover Assets, to defendant Sudan, and to any agency and instrumentality of Sudan, or to any other party otherwise entitled to claim the Turnover Assets (in whole or in part), including without limitation, the plaintiffs in *Owens, et al. v. Republic of Sudan, et al.*, 1:01-cv-02244-JDB (D.D.C.), and any other persons or entities, to the full extent of such amounts so held and deposited in compliance with this partial judgment. Mashreqbank shall provide a copy of this order to counsel for Owens within 5 days of the date of this order.

10. Upon payment and turnover by Mashreqbank of the Turnover Assets to the Plaintiffs, plus all accrued interest thereon to date, all other persons and entities shall be permanently restrained and enjoined from instituting or prosecuting any claim, or pursuing any action against Mashreqbank in any jurisdiction or tribunal arising from or relating to any claim (whether legal or equitable) to the funds turned over in compliance with paragraph 7 of this Order.

11. This Order enforces a duly registered District Court judgment from the District of Columbia, recognized by a New York Federal Court and given full faith and credit by this Court.

So ordered,

/s/ Analisa Torres
ANALISA TORRES
United States District Judge

Date: December 12, 2013

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[Filed: 12/13/13]

Case No. 1:13-cv-03127 (AT)

RICK HARRISON, JOHN BUCKLEY III, MARGARET LOPEZ, ANDY LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARDS LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, MARTIN SONGER, JR., SHELLY SONGER, JEREMY STEWARD, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE, AND TRACY SMITH, as Personal Representative of the Estate of Rubin Smith,

Plaintiffs,

vs.

THE REPUBLIC OF SUDAN,

Defendant,

vs.

BNP PARIBAS,

Respondent.

AMENDED TURNOVER ORDER AGAINST BNP PARIBAS
REDACTED PURSUANT TO PROTECTIVE ORDER

AND NOW, this 13th day of December, 2013, upon Plaintiffs' Petition for Turnover Order Against BNP Paribas pursuant to 28 U.S.C. § 1610(g), CPLR § 5225(b) and Federal Rule of Civil Procedure 69(a), and Plaintiffs' Unopposed Motion for Order Amending

Turnover Order Against BNP Paribas, the Motion is GRANTED. The Court hereby finds and orders as follows:

1. Plaintiffs obtained a judgment in the District Court for the District of Columbia in the amount of $314,705,896, plus interest (the "Judgment"), and the entire principal amount of the Judgment remains unsatisfied.

2. Funds held at BNP Paribas New York Branch are subject to execution and attachment under the Foreign Sovereign Immunities Act because the owners of the funds are agencies and instrumentalities of the Republic of Sudan.

3. [redacted], also known as [redacted] is an agency and instrumentality of the Sudanese government. The following accounts, totaling [redacted], plus accrued interest, are subject to execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	**Account Beneficiary**	**Blocking Date**	**Value** (as of June 20, 2012)
BNP Paribas	[redacted]	[redacted]	[redacted]
BNP Paribas	[redacted]	[redacted]	[redacted]
BNP Paribas	[redacted]	[redacted]	[redacted]
BNP Paribas	[redacted]	[redacted]	[redacted]
BNP Paribas	[redacted]	[redacted]	[redacted]

4. [redacted], Sudan is an agency and instrumentality of the Sudanese government. The

following accounts, totaling [redacted], plus accrued interest, are subject to execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	**Account Beneficiary**	**Blocking Date**	**Value** (as of June 30, 2012)
BNP Paribas	[redacted]	[redacted]	[redacted]
BNP Paribas	[redacted]	[redacted]	[redacted]
BNP Paribas			
BNP Paribas			

5. [redacted] is an agency and instrumentality of the **Sudanese government. The following accounts, totaling [redacted], plus accrued interest, are subject to execution to satisfy Plaintiffs' outstanding judgment:**

Respondent Bank	**Account Beneficiary**	**Blocking Date**	**Value** (as of June 20, 2012)
BNP Paribas	[redacted]	[redacted]	[redacted]
BNP Paribas	[redacted]	[redacted]	[redacted]

6. [redacted], formerly known as , is an agency and instrumentality of Sudan. The following account totaling [redacted], plus accrued interest, is subject to execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	**Account Beneficiary**	**Blocking Date**	**Value** (as of June 20, 2012)
BNP Paribas	[redacted]	[redacted]	[redacted]

7. [redacted] is an agency and instrumentality of Sudan. The following account, totaling [redacted], execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	**Account Beneficiary**	**Blocking Date**	**Value** (as of June 20, 2012)
BNP Paribas	[redacted]	[redacted]	[redacted]

8. [redacted] is an agency and instrumentality of Sudan. The following accounts totaling [redacted], plus accrued interest, are subject to execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	**Account Beneficiary**	**Blocking Date**	**Value** (as of June 20, 2012)
BNP Paribas	[redacted]	[redacted]	[redacted]
BNP Paribas	[redacted]	[redacted]	[redacted]
BNP Paribas	[redacted]	[redacted]	[redacted]

9. The Court hereby directs BNP Paribas to turn over the proceeds of the foregoing accounts, totaling [redacted], (the "Turnover Assets"), together with any accrued interest, to the Plaintiffs within ten (10) days from the date of this Order.

10. An OFAC license is not necessary to disburse these funds and no notice is necessary to the Sudanese agencies and instrumentalities. *See Heiser v. Bank of Tokyo Mitsubishi UFJ, New York Branch*, 919 F. Supp. 2d 411, 422 (S.D.N.Y. 2013); *Heiser v. Islamic Republic of Iran*, 807 F. Supp. 2d 9, 23 (D.D.C. 2011); *Weininger v. Castro*, 432 F. Supp. 2d 457 (S.D.N.Y. 2006).

11. Upon turnover by BNP Paribas of the Turnover Assets to the Plaintiffs, plus all accrued interest thereon to date, BNP Paribas shall be fully discharged pursuant to CPLR §§ 5209 or 6204 and Rule 22 of the Federal Rules of Civil Procedure, as applicable, and released from any and all liability and obligations or other liabilities, including all writs of execution, notices of pending action, restraining notices and other judgment creditor process of any kind, whether served on, or delivered to BNP Paribas, to the extent that they apply, purport to apply or attach to the Turnover Assets, to defendant Sudan, and to any agency and instrumentality of Sudan, or to any other party otherwise entitled to claim the Turnover Assets (in whole or in part), including without limitation, the plaintiffs in *Owens, et al. v. Republic of Sudan, et al.*, 1:01-cv-02244-JDB (D.D.C.), and any other persons or entities, to the full extent of such amounts so held and deposited in compliance with this partial judgment. BNP Paribas shall provide a copy of this order to counsel for Owens within 5 days of the date of this order.

12. Upon payment and turnover by BNP Paribas of the Turnover Assets to the Plaintiffs, plus all accrued interest thereon to date, all other persons and entities shall be permanently restrained and enjoined from instituting or prosecuting any claim, or pursuing any action against BNP Paribas in any jurisdiction or tribunal arising from or relating to any claim (whether legal or equitable) to the funds turned over in compliance with paragraph 9 of this Order.

13. This Order enforces a duly registered District Court judgment from the District of Columbia, recognized by a New York Federal Court and given full faith and credit by this Court.

14. This Order supersedes any prior order relating to the Turnover Assets described in this Order.

So ordered,

/s/ Analisa Torres
ANALISA TORRES

United States District Judge

Date: December 13, 2013

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[Filed: 01/06/14]

Case No. 1:13-cv-03127 (AT)

RICK HARRISON, JOHN BUCKLEY III, MARGARET LOPEZ, ANDY LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARDS LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, MARTIN SONGER, JR., SHELLY SONGER, JEREMY STEWARD, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE, AND TRACY SMITH, as Personal Representative of the Estate of Rubin Smith,

Plaintiffs,

vs.

THE REPUBLIC OF SUDAN,

Defendant,

vs.

CREDIT AGRICOLE CORPORATE & INVESTMENT BANK,

Respondent.

~~[PROPOSED]~~ TURNOVER ORDER

WHEREAS on December 18, 2013, Plaintiffs, Rick Harrison, John Buckley III, Margaret Lopez, Andy Lopez, Keith Lorensen, Lisa Lorensen, Edwards Love, Robert McTureous, David Morales, Gina Morris, Martin Songer, Jr., Shelly Songer, Jeremy Steward, Kesha Stidham, Aaron Toney, Eric Williams, Carl

Wingate, and Tracy Smith, as Personal Representative of the Estate of Rubin Smith ("Plaintiffs"), filed their Petition for Turnover Order Against Credit Agricole Corporate and Investment Bank ("CA-CIB") pursuant to 28 U.S.C. § 1610(g), CPLR § 5225(b) and Federal Rule of Civil Procedure 69(a) ("Petition"), which is currently before the Court;

WHEREAS, Plaintiffs have provided notice to the United States Department of the Treasury's Office of Foreign Assets Control ("OFAC") of this Petition and OFAC having not appeared or otherwise objected to the relief sought in the Petition;

WHEREAS, Plaintiffs obtained a judgment in the District Court for the District of Columbia in the amount of $314,705,896, plus interest (the "Judgment"), and the entire principal amount of the Judgment remains unsatisfied; and

WHEREAS, Plaintiffs' Petition establishes that the funds described in the Petition, totaling [redacted] (as of June 29, 2012), plus accrued interest (the "Turnover Assets"), are subject to turnover pursuant to C.P.L.R. § 5225, 28 U.S.C. § 1610(g) and the Terrorism Risk Insurance Act of 2002, Pub. No. 107-297, 116 Stat. 2322 (2002), codified at 28 U.S.C. § 1610, in partial satisfaction of Plaintiffs' Judgment.

AND NOW, this 6th day of January, 2014 upon Plaintiffs' Petition, it is ORDERED, ADJUDGED AND DECREED THAT:

1. The Petition is GRANTED.

2. The Court finds that the Turnover Assets are subject to turnover pursuant to § 201 of the Terrorism Risk Insurance Act of 2002 and are subject to execution and attachment under the Foreign Sovereign

Immunities Act because the owners of the funds are agencies and instrumentalities of the Republic of Sudan.

3. [redacted] is an agency and instrumentality of the Sudanese government. The following accounts, totaling [redacted] and [redacted] (as of June 29, 2012), plus accrued interest, are subject to execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	Originating Entity/ Originating Bank	Blocking Date	Value ($) (as of June 29, 2012
CA-CIB	[redacted]	[redacted]	[redacted]
CA-CIB	[redacted]	[redacted]	[redacted]

4. [redacted] is an agency and instrumentality of the Sudanese government. The following account, totaling [redacted] (as of June 29, 2012), plus accrued interest, is subject to execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	Originating Entity/ Originating Bank	Blocking Date	Value ($) (as of June 29, 2012
CA-CIB	[redacted]	[redacted]	[redacted]

5. The Court hereby directs CA-CIB to turn over the Turnover Assets totaling [redacted] (as of June 29, 2012), together with accrued interest, by wire transfer to Plaintiffs' counsel, Hall, Lamb and Hall, P.A., pursuant to wire instructions to be furnished to CA-CIB by Plaintiffs, in partial satisfaction of Plaintiffs'

Judgment, within fifteen (15) days from the date of this Order.

6. Upon turnover by CA-CIB of the funds identified herein to the Plaintiffs, plus all accrued interest thereon to date, Credit Agricole shall be fully discharged pursuant to CPLR §§ 5209 or 6204 and Rule 22 of the Federal Rules of Civil Procedure, as applicable, and released from any and all liability and obligations or other liabilities in connection with the turnover of those funds, including all writs of execution, notices of pending action, restraining notices and other judgment creditor process of any kind, whether served on, or delivered to CA-CIB, to the extent that they apply, purport to apply or attach to the Turnover Assets, to defendant The Republic of Sudan, and to any agency and instrumentality of The Republic of Sudan, or to any other party otherwise entitled to claim the Turnover Asset (in whole or in part), and any other persons or entities, to the full extent of such amounts so held and deposited in compliance with this Judgment.

7. Upon payment and turnover by CA-CIB of the Turnover Assets to Plaintiffs, plus all accrued interest thereon to date, all other persons and entities shall be permanently restrained and enjoined from instituting or prosecuting any claim, or pursuing any actions against CA-CIB in any jurisdiction or tribunal arising from or relating to any claim (whether legal or equitable) to the funds turned over in compliance with paragraph 3 of this Order.

8. Plaintiffs' Information Subpoena, Interrogatories, and Restraining Notice to CA-CIB shall be vacated except with respect to the three accounts identified in paragraph 10, below.

9. An OFAC license is not necessary to disburse these funds and no notice is necessary to the Sudanese agencies and instrumentalities. *See Heiser v. Bank of Tokyo Mitsubishi UFJ, New York Branch*, 919 F. Supp. 2d 411, 422 (S.D.N.Y. 2013); *Heiser v. Islamic Republic of Iran*, 807 F. Supp. 2d 9, 23 (D.D.C. 2011); *Weininger v. Castro*, 432 F. Supp. 2d 457 (S.D.N.Y. 2006).

10. Notwithstanding anything in this Order to the contrary, Plaintiffs reserve all rights to seek turnover of the following other amounts blocked by CA-CIB pursuant to regulations promulgated by OFAC, which CA-CIB will continue to restrain:

Respondent Bank	**Originating Entity/ Originating Bank**	**Blocking Date**	**Value ($) (as of June 29, 2012**
CA-CIB	[redacted]	[redacted]	[redacted]
CA-CIB	[redacted]	[redacted]	[redacted]
CA-CIB	[redacted]	[redacted]	[redacted]

Plaintiffs and CA-CIB shall meet and confer as to these amounts following the issuance by the Second Circuit of its rulings in *Calderon-Cardona v. JPMorgan Chase Bank, N.A.*, No. 12-75 (2d Cir), and *Hausler v. JPMorgan Chase, N.A.*, Nos. 12-1264 & 12-1272 (2d Cir.).

11. This Order enforces a duly registered District Court judgment from the District of Columbia, recognized by a New York Federal Court and given full faith and credit by this Court.

So ordered,

/s/ Analisa Torres
ANALISA TORRES
United States District Judge

Date: January 6, 2014

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed 09/22/2016]

August Term 2015

(Argued: March 11, 2016
Decided: September 22, 2016)

Docket No. 14-121-cv

RICK HARRISON, JOHN BUCKLEY, III, MARGARET LOPEZ, ANDY LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARD LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, MARTIN SONGER, JR., SHELLY SONGER, JEREMY STEWART, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE, TRACEY SMITH, as personal representative of the Estate of Rubin Smith,

Plaintiffs-Appellees,

v.

REPUBLIC OF SUDAN,

Defendant-Appellant,

ADVANCED CHEMICAL WORKS, AKA Advanced Commercial and Chemical Works Company Limited, AKA Advanced Training and Chemical Works Company Limited, Accounts & Electronics Equipments, AKA Accounts and Electronics Equipments, et al.,

Defendants,

NATIONAL BANK OF EGYPT, CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK,

Respondents.

ON PETITION FOR REHEARING

Before: LYNCH and CHIN, *Circuit Judges*, and KORMAN, *District Judge*.*

The Republic of Sudan petitions for panel rehearing or rehearing *en banc* of this Court's decision holding that service of process on the Minister of Foreign Affairs via the Sudanese Embassy in Washington, D.C., was sufficient to meet the requirements of the Foreign Sovereign Immunities Act (the "FSIA"). The United States, as *amicus curiae*, supports the Republic of Sudan and seeks clarification on the issue of whether § 1610(g) of the FSIA overrides the requirement of a license from the Treasury Department's Office of Foreign Assets Control. The petition is DENIED to the extent it seeks panel rehearing.

ANDREW C. HALL (Roarke Maxwell, *on the brief*), Hall, Lamb and Hall, P.A., Miami, Florida, *for Plaintiffs-Appellees*.

CHRISTOPHER M. CURRAN (Nicole Erb, Claire A. DeLelle, *on the brief*), White & Case LLP, Washington, D.C., *for Defendant-Appellant*.

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* The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

DAVID S. JONES, Assistant United States Attorney (Benjamin H. Torrance, Assistant United States Attorney, *on the brief*), *for* Preet Bharara, United States Attorney for the Southern District of New York, New York, New York, *for the United States of America as* Amicus Curiae.

CHIN, *Circuit Judge*:

On September 23, 2015, we affirmed three orders of the United States District Court for the Southern District of New York (Torres, *J.*) directing certain banks to turnover assets of defendant-appellant Republic of Sudan ("Sudan") to satisfy a judgment entered in favor of plaintiffs against Sudan in the United States District Court for the District of Columbia (the "D.C. District Court"), in the amount of $314,705,896. Sudan petitions for panel rehearing or rehearing *en banc*, supported by the United States of America, as *amicus curiae*.

After further briefing and argument, upon due consideration, we adhere to our decision to affirm. The petition is DENIED to the extent it seeks panel rehearing.

BACKGROUND

The facts and procedural history are set forth in our September 23, 2015 opinion, familiarity with which is assumed. *See Harrison v. Republic of Sudan*, 802 F.3d 399 (2d Cir. 2015) (the "Panel Opinion"). We summarize the background as follows:

This case arises from the bombing of the U.S.S. Cole in the port of Aden, Yemen, in 2000. Sailors and spouses of sailors injured in the explosion brought suit

against Sudan in the D.C. District Court under the FSIA, 28 U.S.C. §§ 1130, 1602 *et seq.*, alleging that al Qaeda was responsible for the attack and that Sudan had provided material support to al Qaeda.

The action was commenced in October 2010, and, at plaintiffs' request, the Clerk of the D.C. District Court served the summons and complaint on Sudan in November 2010 by mailing the papers to the Minister of Foreign Affairs of Sudan via the Sudanese Embassy in Washington, D.C. The papers were sent via registered mail, return receipt requested to:

> Republic of Sudan
> Deng Alor Koul
> Minister of Foreign Affairs
> Embassy of the Republic of Sudan
> 2210 Massachusetts Avenue NW
> Washington, DC 2008

As represented by plaintiffs, Deng Alor Koul was the Minister of Foreign Affairs of Sudan at the time.

On November 17, 2010, the Clerk of Court entered a Certificate of Mailing certifying that the summons and complaint were sent via domestic certified mail to the "head of the ministry of foreign affairs," via the Sudanese Embassy in Washington, D.C., and that the return receipt was returned to the Clerk of Court and received on November 23, 2010. No attempt was made to serve Sudan by mail to the address of the Ministry of Foreign Affairs in Khartoum, the capital. Sudan failed to serve an answer or other responsive pleading within sixty days after plaintiffs' service, *see* 28 U.S.C. § 1608(d), and the Clerk of Court thus entered a default against Sudan.

On March 30, 2012, after a hearing, the D.C. District Court (Lamberth, *J.*) entered a default judgment

against Sudan in the amount of $314,705,896, *Harrison v. Republic of Sudan*, 882 F. Supp. 2d 23, 51 (D.D.C. 2012), and found, *inter alia*, that service on Sudan had been proper, *id.* at 28. At the request of plaintiffs, on April 20, 2012, the Clerk of the Court mailed a copy of the default judgment by registered mail, return receipt requested, to Sudan's Minister of Foreign Affairs, via the Sudanese Embassy in Washington, D.C. While it does not appear that the receipt was returned, plaintiffs submitted proof that the mailing was delivered.

The judgment was thereafter registered in the Southern District of New York. In December 2013 and January 2014, the Southern District issued three turnover orders, directing certain banks to turnover assets of Sudan to plaintiffs. It was only after the last of these three turnover orders was entered that Sudan finally filed a notice of appearance, on January 13, 2014. The same day, Sudan appealed the turnover orders to this Court.[1]

In affirming the turnover orders, we held that service of process on the Minister of Foreign Affairs via the Sudanese Embassy in Washington, D.C., was sufficient to meet the requirements of the FSIA. *Harrison*, 802 F.3d at 406. We also held that the District Court did not err in issuing the turnover orders without first obtaining a license from the Treasury Department's Office of Foreign Assets Control

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[1] Nearly a year and a half later, after this appeal had been argued and while the appeal was pending, Sudan made a Rule 60(b) motion in the D.C. District Court to set aside the default judgment. Motion to Vacate Memorandum & Opinion, *Harrison v. Republic of Sudan*, No. 1:10-cv-01689-RCL (D.D.C. June 14, 2015), ECF No. 55. That court has not yet decided that motion.

("OFAC") or a Statement of Interest from the Department of Justice. *Id.* at 407.

On October 7, 2015, Sudan filed this petition for panel rehearing or rehearing *en banc*. Although it had not appeared in the earlier proceedings, the United States filed an *amicus* brief in support of the petition on November 6, 2015. After further briefing, we heard argument on March 11, 2016. We now deny the petition to the extent it seeks panel rehearing.

DISCUSSION

Sudan and the United States argue that the Panel Opinion misinterprets § 1608(a)(3) of the FSIA and puts the United States in violation of its obligations under the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227 (entered into force in United States Dec. 13, 1972) [hereinafter "Vienna Convention"]. In its reply brief, Sudan also makes the factual argument that the summons and complaint were not actually delivered to the embassy. Finally, as to the issue of the requirement of an OFAC license, the United States argues that the FSIA does not override the requirement of an OFAC license. We address each of these issues in turn.

I. *Interpretation of § 1608(a)(3)*

Sudan and the United States argue that the Panel Opinion incorrectly interprets § 1608(a)(3) of the FSIA. We acknowledge that the statutory interpretation question presents a close call, and that the language of § 1608(a)(3) is not completely clear. Nonetheless, for the reasons discussed below, we believe, as a matter of statutory construction, that the better reading of the statute favors plaintiffs' position. Accordingly, we adhere to our prior decision.

A. *The Plain Language*

The "starting point in statutory interpretation is the statute's plain meaning, if it has one." *United States v. Dauray*, 215 F.3d 257, 260 (2d Cir. 2000). Section 1608(a)(3) of the FSIA reads: "Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state . . . by sending a copy of the summons and complaint and a notice of suit . . . to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. § 1608(a)(3).[2]

On its face, the statute does not specify a location where the papers are to be sent; it specifies only that the papers are to be addressed and dispatched to the head of the ministry of foreign affairs. Nothing in § 1608(a)(3) requires that the papers be mailed to a location in the foreign state, or indeed to any particular address, and nothing in the statute precluded the method chosen by plaintiffs. A mailing addressed to the minister of foreign affairs via Sudan's embassy in Washington, D.C., was consistent with the language of the statute and could reasonably be expected to result in delivery to the intended person.[3] Plaintiffs literally

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[2] As we discuss in the Panel Opinion, the FSIA provides for four methods of service. *Harrison*, 802 F.3d at 403. The method set forth in § 1608(a)(3) is the method at issue in this case.

[3] An embassy is a logical place to direct a communication intended to reach a foreign country. As explained by the United States State Department, "an embassy is the nerve center for a country's diplomatic affairs within the borders of another nation, serving as the headquarters of the chief of mission, staff and other agencies." Diplomacy 101, What Is a U.S. Embassy?, http://diplomacy.state.gov/discoverdiplomacy/diplomacy101/places/170537.htm; *see also Rux v. Republic of Sudan*, No. Civ.A. 2:04CV428, 2005 WL 2086202, at *16 (E.D. Va. Aug. 26, 2005),

complied with the statute – they sent a copy of the summons and complaint addressed to the head of the ministry of foreign affairs of Sudan.

The statute does not specify that the mailing be sent to the head of the ministry of foreign affairs *in* the foreign country. If Congress had wanted to require that the mailing be sent to the minister of foreign affairs at the principal office of the ministry in the foreign country, it could have said so – but it did not. *See Burrage v. United States*, 134 S. Ct. 881, 892 (2014) ("The role of this Court is to apply the statute as it is written—even if we think some other approach might 'accor[d] with good policy.'") (quoting *Commissioner v. Lundy*, 516 U.S. 235, 252 (1996)); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176 (1994) (rejecting argument that aiding and abetting liability existed because Congress did not use words "aid" and "abet" in statutory text and noting that "Congress knew how to impose aiding and abetting liability when it chose to do so"). In § 1608(a)(4), for example, Congress specified that the papers be mailed "to the Secretary of State *in Washington, District of Columbia*, to the attention of

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aff'd on other grounds, 461 F.3d 461 (4th Cir. 2006) (underscoring the "inherent reliability and security associated with diplomatic pouches," which, "unlike the United States Postal Service, DHL, or any other commercial carrier, is accorded heightened protection under international law to ensure safe and uncompromised delivery of documents between countries" (citing Vienna Convention, art. 27)). We do not suggest that service could be made on a minister of foreign affairs via other offices in the United States or another country maintained by the country in question, such as, *e.g.*, a consular office, the country's mission to the United Nations, or a tourism office.

the Director of Special Consular Services," for transmittal to the foreign state "through diplomatic channels." 28 U.S.C. § 1608(a)(4) (emphasis added).

The United States argues that the FSIA's service provisions require strict compliance, and that mailing the papers to "the foreign minister at a place other than the foreign ministry" is not authorized by the statute. Amicus Br. of the United States at 3. The United States argues that "[t]he most natural understanding of [the statute's] text is that the mail will be sent to the head of the ministry of foreign affairs at his or her regular place of work – *i.e.*, at the ministry of foreign affairs in the state's seat of government." *Id.* at 2. This argument is unpersuasive, as it would require us to read the words "at his or her regular place of work" or "at the state's seat of government" into the statute. *See Dean v. United States*, 556 U.S. 568, 572 (2009) (courts must "ordinarily resist reading words or elements into a statute that do not appear on its face") (quoting *Bates v. United States*, 522 U.S. 23, 29 (1997)).

The United States argues that our reading of § 1608(a)(3) is undermined by other provisions in the statute. It argues that because the FSIA permits the use of an authorized agent only in the context of service under § 1608(b)(2) – the provision that deals with service on foreign state agencies and instrumentalities – we should infer that "Congress did not intend to allow service on a foreign state via delivery to any entity that could, by analogy, be considered the foreign state's officer or agent, including the state's embassy." Amicus Br. of the United States at 3. This argument rests on the premise that the Panel Opinion requires an embassy to act as an agent of a foreign

state. We did not so hold, and, to the extent there is any doubt, we now clarify.

We do not hold that an embassy is an agent for service or a proxy for service for a foreign state. There is a significant difference between *serving process* on an embassy, and mailing papers to a country's foreign ministry *via* the embassy. Here, the summons and complaint were addressed to the Sudanese Minister of Foreign Affairs, by name and title, at the Sudanese Embassy. The embassy accepted the papers, signing for them and sending back a return receipt to the Clerk of Court.[4] The embassy could have rejected the mailing, but instead it accepted the papers and then explicitly acknowledged receipt. Accordingly, the papers were not served on the embassy as a proxy or agent for Sudan, but they were instead mailed to the Minister of Foreign Affairs, in the most natural way possible – addressed to him, by name, via Sudan's embassy.

In short, while the language of the statute is not wholly unambiguous, we believe that the better reading is that it did not require service on the foreign minister at his or her regular place of work or in the state's seat of government. Hence, service on the foreign minister via the embassy was not inconsistent with the wording of the statute.

B. *Legislative History*

We turn to the legislative history to see whether it sheds light on the statutory interpretation question

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[4] In its reply brief on its petition for rehearing, Sudan argues for the first time in this nearly six-year old litigation that in fact the embassy did not receive the papers. We discuss this issue below.

As we noted in the Panel Opinion, while the 1976 House Judiciary Committee Report makes clear that the statute does not permit service by "the mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state," see H.R. Rep. No. 94–1487, at 26 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6625, it does not address the question of mailing the papers to the minister of foreign affairs via or care of an embassy. The Report provides,

> Special note should be made of two means which are currently in use in attempting to commence litigation against a foreign state .... A second means, of questionable validity, involves the mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state. Section 1608 precludes this method so as to avoid questions of inconsistency with section 1 of article 22 of the Vienna Convention on Diplomatic Relations, 23 UST 3227, TIAS 7502 (1972), which entered into force in the United States on December 13, 1972. Service on an embassy by mail would be precluded under this bill. See 71 Dept. of State Bull. 458-59 (1974).

H.R. Rep. 94–1487, at 26.

As we noted in the Panel Opinion, the report fails to make the distinction at issue in the instant case, between "[s]ervice *on* an embassy by mail," *id.* (emphasis added), and service on a minister or foreign affairs *via* or *care of* an embassy. The legislative history does not address, any more than does the statutory text, whether Congress intended to permit the mailing of service to a foreign minister via an embassy. What it does make clear, however, is that Congress was concerned about the interaction of this provision and

Article 22 of the Vienna Convention. Accordingly, we must consider the Vienna Convention, which we discuss below.

C. *Judicial Interpretation*

Before turning to the Vienna Convention, we consider the case law on the statutory interpretation issue.

As we noted in the Panel Opinion, we are not alone in our reading of § 1608(a)(3). In *Wye Oak Technology, Inc. v. Republic of Iraq*, the Eastern District of Virginia held that "Section (a)(3) does not impose a requirement that an otherwise proper service package must be delivered to a particular destination." No. 1:09cv793, 2010 WL 2613323, at *5 (E.D. Va. June 29, 2010), *aff'd on other grounds*, 666 F.3d 205 (4th Cir. 2011). There, the court held that service via an embassy is sufficient to satisfy the FSIA as long as the service is directed to the Minister of Foreign Affairs. *Id.* at *5-6. The Eastern District of Virginia also so held in *Rux v. Republic of Sudan*. 2005 WL 2086202, at *16 ("The text of § 1608(a)(3) does not prohibit service on the Minister of Foreign Affairs at an embassy address. Indeed, the statute does not prescribe the place of service, only the person to whom process must be served."). It is true, as Sudan argues, that these were district court opinions, but Sudan has not cited any case, district court or otherwise, holding that the mailing of papers addressed to the minister of foreign affairs via an embassy does *not* comply with the statute.

None of the cases relied on by Sudan or the United States undermines our reading of § 1608(a)(3). In four of the cases, the plaintiffs served the papers on the embassy or the ambassador, without addressing them

to the minister of foreign affairs. *See Barot v. Embassy of the Republic of Zambia*, 785 F.3d 26, 28-29 (D.C. Cir. 2015) (service package addressed to embassy); *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 741 (7th Cir. 2007) (no record of service but counsel submitted affidavit stating document had been served "on the embassy in Washington, D.C."); *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 253 (7th Cir. 1983) (service package addressed to ambassador); *Ellenbogen v. The Canadian Embassy*, No. Civ.A. 05-01553JDB, 2005 WL 3211428, at *2 (D.D.C. Nov. 9, 2005) (service package addressed to embassy). Consequently, those plaintiffs did not comply with the statute.

In another case, we interpreted a different provision of the FSIA, § 1608(b)(2), and held that persons entitled to diplomatic immunity are not proper agents for service under the FSIA. *Tachiona v. United States*, 386 F.3d 205, 222 (2d Cir. 2004) (holding that § 1608(b)(2) does not authorize service on foreign officials present in United States as agents for a private political party). *Tachiona* did not address the issue before us. In two other cases, the opinions do not say to whom the papers were addressed. *See Lucchino v. Foreign Countries of Brazil, S. Korea, Spain, Mexico, & Argentina*, 631 F. Supp. 821, 826 (E.D. Pa. 1986); *40 D 6262 Realty Corp. v. United Arab Emirates Gov't*, 447 F. Supp. 711 (S.D.N.Y. 1978).

Section 1608(a)(3) explicitly provides that service on a foreign sovereign must be "*addressed* and dispatched by the clerk of the court *to* the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. § 1608(a)(3) (emphasis added). Cases involving mailings not so addressed are not controlling. We adhere to our conclusion that the plain language of

§ 1608(a)(3) does not foreclose the plaintiffs' method of service.

II. *The Vienna Convention*

Sudan and the United States contend that the Panel Opinion places the United States in violation of the Vienna Convention. They contend that the Panel Opinion will complicate international relations by subjecting the United States (and other countries) to service of process via any of its diplomatic missions throughout the world, despite its long-standing policy to refuse such service. As a preliminary matter, we note that these arguments were not properly raised in Sudan's initial briefs. Nonetheless, we exercise our discretion to consider the arguments, and we reject them.

The FSIA is the sole basis for obtaining jurisdiction over a foreign state in the courts of the United States. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). As noted above, the "legislative history of the FSIA demonstrates unequivocally that the Act was not intended to affect the immunity of 'diplomatic or consular representatives,'" that was established under the Vienna Convention and customary international law. *Tachiona*, 386 F.3d at 222-23 (quoting H.R. Rep. 94–1487, at 21). "Under the terms of [the Vienna Convention], the United States, in its role as a receiving state of foreign missions, is obligated to protect and respect the premises of any foreign mission located within its sovereign territory." *Bennett v. Islamic Republic of Iran*, 604 F. Supp. 2d 152, 159 (D.D.C. 2009), *aff'd*, 618 F.3d 19 (D.C. Cir. 2010).

The Panel Opinion does not conflict with the Vienna Convention. The Vienna Convention provides that

"[t]he premises of the mission shall be inviolable," and that "[a] diplomatic agent shall . . . enjoy immunity from [the host state's] civil and administrative jurisdiction." Vienna Convention, arts. 22, 31; *see also* H.R. Rep. 94–1487, at 26 ("Service on an embassy by mail would be precluded under this bill."). We acknowledge that these provisions preclude service of process on an embassy or diplomat as an agent of a foreign government, as there would be a breach of diplomatic immunity if an envoy were subjected to compulsory process. *See Tachiona*, 386 F.3d at 222 (noting that "the inviolability principle precludes service of process on a diplomat as agent of a foreign government"); *40 D 6262 Realty Corp.*, 447 F. Supp. at 712 (holding that the FSIA's legislative history makes clear that service by mail on an embassy is precluded under the Act). Accordingly, service on an embassy or consular official would be improper. But that is not what happened here. Rather, process was served on the Minister of Foreign Affairs at the foreign mission and not on the foreign mission itself or the ambassador. The papers were specifically addressed to the Minister of Foreign Affairs via the embassy, and the embassy sent back a return receipt acknowledging receipt of the papers.

The United States explains that it "consistently rejects attempted service via direct delivery to a U.S. embassy abroad. When a foreign court or litigant purports to serve the United States through an embassy, the embassy sends a diplomatic note to the foreign government indicating that the United States does not consider itself to have been served properly." Amicus Br. of the United States at 6. Our holding does not affect this policy. We do not preclude the United States (or any other country) from enforcing a policy of refusing to accept service via its embassies. We have previously recognized that "[w]ere the United States to

adopt exceptions to the inviolability of foreign missions here, it would be stripped of its most powerful defense, that is, that international law precludes the nonconsensual entry of its missions abroad." *767 Third Ave. Assocs. v. Permanent Mission of Republic of Zaire to United Nations*, 988 F.2d 295, 300-01 (2d Cir. 1993). The United States may continue to instruct its embassies to follow this protocol, and so may any other country with a foreign diplomatic embassy. Nothing about our decision affects the ability of any state to refuse to accept service via its embassies.

Here, Sudan did not elect to follow any such policy. It did not reject the service papers, as it could have done easily, but accepted them. In these circumstances, where plaintiffs mailed the documents addressed to the Sudanese Minister of Foreign Affairs via the embassy, and the embassy explicitly acknowledged receipt of the documents, the requirements of the statute were met.

Significantly, the Vienna Convention provides that a mission may "consent" to entry onto its premises. Section 1 of Article 22 of the Convention provides that: "The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the *consent* of the head of the mission." Vienna Convention, art. 22 (emphasis added). Here, the Sudanese Embassy's acceptance of the service package surely constituted "consent." Instead of rejecting the service papers, Sudan accepted them and then, instead of returning them, it explicitly acknowledged receiving them. These actions, we conclude, constitute consent.

The Vienna Convention "recognized the independence and sovereignty of mission premises that existed under customary international law." *767 Third Ave.*

Assocs., 988 F.2d at 300. An important reason for the inviolability of the embassy premises is that the embassy is, to some degree, an extension of the sovereignty of the sending state. *See United States v. Gatlin*, 216 F.3d 207, 214 n.9 (2d Cir. 2000). To send officers into the embassy to serve papers would thus be akin to sending officers into the sovereign territory of the sending state itself. There is nothing offensive, however, about mailing a letter into the sovereign territory of a foreign state. Indeed, that is the very procedure that Sudan and the State Department urge is the preferred and required practice. We therefore find it difficult to understand how mailing a letter to the Foreign Minister of a country in care of that country's embassy in Washington – particularly given that the embassy remains free to refuse delivery if it so chooses – can be considered a grave insult to the "independence and sovereignty" of the embassy's premises.

Indeed, the embassy is extended somewhat *less* sovereignty than the actual territory of the sending state. *See McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 588 (9th Cir. 1983) ("A United States embassy, however, remains the territory of the receiving state, and does not constitute territory of the United States."); *see also* Jordan J. Paust, *Non-Extraterritoriality of 'Special Territorial Jurisdiction' of the United States: Forgotten History and the Errors of Erdos*, 24 YALE J. INT'L L. 305, 312 (1999) ("[A] U.S. embassy in foreign state territory is not U.S. territory and is not within the territorial jurisdiction of the United States, any more than a foreign embassy within the United States is foreign territory or within the territorial jurisdiction of a foreign state."). While the precise degree to which the sovereignty of the embassy is less than a state's control over its own territory is subject to debate, it is

evident that an embassy is not *more* sovereign than the territory of the sending state itself.

It is with some reluctance that we diverge from the Executive Branch's interpretation of the Vienna Convention, and of the potential effect of the Convention on the interpretation of the FSIA. It is appropriate to give the government's interpretation of the Vienna Convention "great weight" – and we do – but the State Department's views are "not conclusive." *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982). For the reasons stated above, we do not find those views persuasive.

III. *The Factual Argument*

In its reply in support of its petition for rehearing, Sudan argues that the evidence does not support a finding that the mailing was accepted by Sudan or delivered to the Sudanese Minister of Foreign Affairs. It argues that the signatures on the return receipt are illegible and it makes a factual argument that the package never reached the embassy.

Sudan's factual challenge to the service of process comes too late, for three independent reasons. First, Sudan raises the factual arguments for the first time on appeal. "[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 132 (2d Cir. 2008) (quoting *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006)).

Second, the factual challenge to service requires factfinding. "[F]actfinding is the basic responsibility of district courts, rather than appellate courts, and . . . the Court of Appeals should not . . . resolve[] in the first instance [a] factual dispute which ha[s] not

been considered by the District Court." *DeMarco v. United States*, 415 U.S. 449, 450 n.* (1974). The factual challenge should have been raised during the five years that the case was pending in the district courts.

Third, even on appeal, Sudan did not raise the factual challenge until its reply brief in support of its petition for rehearing. It did not raise the issue in its briefing of the main appeal or in its initial submission on this petition for rehearing. *See Knipe v. Skinner*, 999 F.2d 708, 711 (2d Cir. 1993) ("Arguments may not be made for the first time in a reply brief.").

Accordingly, the factual challenge is not properly before us.

IV. *The Requirement of an OFAC License*

The United States also seeks to clarify the Panel Opinion with respect to when a license from OFAC is required. In the Panel Opinion, we held that the District Court did not err in issuing turnover orders without first obtaining either an OFAC license or a Statement of Interest from the Department of Justice. *See Harrison*, 802 F.3d at 406-07. This holding was based on the United States' position in previous Statements of Interest that § 201(a) of the Terrorism Risk Insurance Act ("TRIA"), Pub. L. No. 107–297, 116 Stat. 2322, 2337 (codified at 28 U.S.C. § 1610 note), permits a 28 U.S.C. § 1605A judgment holder to attach assets that have been blocked pursuant to certain economic sanctions laws without obtaining an OFAC license. The Panel Opinion included language, however, that may have suggested that § 1610(g) of the FSIA might permit a person holding a judgment under § 1605A to attach blocked assets without an OFAC license.

Harrison, 802 F.3d at 407-08. This is not the case and thus we now clarify our ruling.

Section 1605 of the FSIA creates exceptions to the general blanket immunity of foreign states from the jurisdiction of U.S. courts, including the "terrorism exception," 28 U.S.C. § 1605A, which Congress added to the FSIA in 1996 to "give American Citizens an important economic and financial weapon against . . . outlaw states" that sponsor terrorism. H.R. Rep. No. 104–383, at 62 (1995). This exception allows courts to hear claims against foreign states designated by the State Department as "state sponsor[s] of terrorism." *See Calderon–Cardona v. Bank of N.Y. Mellon*, 770 F.3d 993, 996 (2d Cir. 2014).

The TRIA was enacted to aid victims of terrorism in satisfying judgments against foreign sponsors of terrorism. Section 201(a) of the TRIA, which governs post-judgment attachment in some terrorism cases, provides, in relevant part:

> *Notwithstanding any other provision of law* . . . , in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605A or 1605(a)(7) (as such section was in effect on January 27, 2008) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

been considered by the District Court." *DeMarco v. United States*, 415 U.S. 449, 450 n.* (1974). The factual challenge should have been raised during the five years that the case was pending in the district courts.

Third, even on appeal, Sudan did not raise the factual challenge until its reply brief in support of its petition for rehearing. It did not raise the issue in its briefing of the main appeal or in its initial submission on this petition for rehearing. *See Knipe v. Skinner*, 999 F.2d 708, 711 (2d Cir. 1993) ("Arguments may not be made for the first time in a reply brief.").

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TRIA § 201(a) (codified at 28 U.S.C. § 1610 note) (emphasis added).

Sudanese assets in the United States are subject to such a block, pursuant to sanctions that began with Executive Order 13067 in 1997 and are now administered by OFAC and codified at 31 C.F.R. Part 538. Ordinarily, unless a plaintiff obtains a license from OFAC, he is barred from attaching assets that are frozen under such sanctions regimes. The Panel Opinion held that, based on previous statements of interest made by the United States, blocked assets that are subject to the TRIA may be distributed without a license from OFAC. *Harrison*, 802 F.3d 408-09.

The Panel Opinion framed the issue, however, as "whether § 201(a) of the TRIA and *§ 1610(g) of the FSIA*, which authorize the execution of § 1605A judgments against state sponsors of terrorism, permit a § 1605A judgment holder to attach blocked Sudanese assets without a license from OFAC. *Id.* at 407-08.

The Panel Opinion should not have included the reference to § 1610(g) of the FSIA. Section 1610(g)(2) of the FSIA, while providing that certain property "shall not be immune from attachment," does not contain the TRIA's same broad "notwithstanding any other provision of law" language. Therefore, it does not override other applicable requirements, such as the requirement of an OFAC license before the funds may be transferred. To be clear, when the TRIA does not apply and the funds at issue are attachable by operation of the FSIA alone, an OFAC license is still required.

In this case, plaintiffs obtained a terrorism judgment from the D.C. District Court pursuant to § 1605A of the FSIA. The Southern District of New York then

issued three turnover orders. The first two orders specified that they were issued pursuant to 28 U.S.C. § 1610(g) but did not mention the TRIA. Only the third order specified that assets were "subject to turnover pursuant to § 201 of the Terrorism Risk Insurance Act of 2002." Joint App. at 76. While the district court did not explicitly discuss whether the funds at issue in the December 12 and 13, 2013 orders were subject to turnover pursuant to the TRIA, based on our review of the record, which includes the complaint and judgment in the D.C. District Court proceedings, and the turnover petition and orders in the proceedings below, we conclude that the funds were subject to turnover pursuant to the TRIA. Plaintiffs have "obtained a judgment against a terrorist party on a claim based upon an act of terrorism," the blocked assets are the assets of that terrorist party, and, accordingly, those assets "shall be subject to execution or attachment in aid of execution in order to satisfy [plaintiffs'] judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable." *See* TRIA § 201(a) (codified at 28 U.S.C. § 1610 note). Because the funds at issue in all three turnover orders were subject to turnover pursuant to the TRIA, plaintiffs were not required to obtain an OFAC license before seeking distribution.

CONCLUSION

For the foregoing reasons, the petition, to the extent it seeks panel rehearing, is DENIED.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed: 12/09/2016]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of December, two thousand sixteen.

Docket No: 14-121

RICK HARRISON, JOHN BUCKLEY, III, MARGARET LOPEZ, ANDY LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARD LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, MARTIN SONGER, JR., SHELLY SONGER, JEREMY STEWART, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE, TRACEY SMITH, as personal representative of the Estate of Rubin Smith,

Plaintiffs-Appellees,

v.

REPUBLIC OF SUDAN,

Defendant-Appellant,

ADVANCED CHEMICAL WORKS, AKA ADVANCED COMMERCIAL AND CHEMICAL WORKS COMPANY LIMITED, AKA ADVANCED TRAINING AND CHEMICAL WORKS COMPANY LIMITED, ACCOUNTS & ELECTRONICS EQUIPMENTS, AKA ACCOUNTS AND ELECTRONICS EQUIPMENTS, et al.,

Defendants,

NATIONAL BANK OF EGYPT, CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK,

Respondents.

ORDER

Appellants Republic of Sudan, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe

[United States Second Circuit Court of Appeals Seal]

APPENDIX G

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

* * *

§ 1391. Venue generally

* * *

(f) CIVIL ACTIONS AGAINST A FOREIGN STATE.—A civil action against a foreign state as defined in section 1603(a) of this title may be brought—

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

* * *

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

* * *

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) IN GENERAL.—

(1) NO IMMUNITY.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) CLAIM HEARD.—The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the

enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

* * *

(c) PRIVATE RIGHT OF ACTION.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

* * *

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

Vienna Convention on Diplomatic Relations

Article 22

1. The premise of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

Civil Procedure

Rule 4. Summons

* * *

(j) Serving a Foreign, State, or Local Government.

(1) *Foreign State.* A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608.

* * *

APPENDIX H

UNITED STATES DISTRICT
AND BANKRUPTCY COURTS
FOR THE DISTRICT OF COLUMBIA

[Filed: 11/05/10]

Civil Action No.: 10-01689HHK

RICK HARRISON, et al.,
Plaintiff(s)

vs.

REPUBLIC OF SUDAN
Defendant(s)

AFFIDAVIT REQUESTING FOREIGN MAILING

I, the undersigned, counsel of record for plaintiff(s), hereby request that the Clerk mail a copy of the summons and complaint (and notice of suit, where applicable) to (list name(s) and address(es) of defendants):

Republic of Sudan
Deng Alor Koul
Minister of Foreign Affairs
Embassy of the Republic of Sudan
2210 Massachusetts Avenue NW
Washington, DC 2008

by: (check one)

☒ registered mail, return receipt requested

☐ DHL

pursuant to the provisions of: (check one)

☐ FRCP 4(f)(2)(C)(ii)

☒ 28 U.S.C. § 1608(a)(3)

☐ 28 U.S.C. § 1608(b)(3)(B)

I certify that this method of service is authorized by the domestic law of (name of country): United States of America and that I obtained this information by contacting the Overseas Citizens Services, U.S. Department of State.

/s/ Nelson M. Jones III
(Signature)

Nelson M. Jones, III
D.C. Bar # 320266
440 Louisiana St., Suite 1575
Houston, Texas 77002
(Name and Address)

UNITED STATES DISTRICT
AND BANKRUPTCY COURTS
FOR THE DISTRICT OF COLUMBIA

[Filed 11/17/10]

Civil Action No.: 1:10-cv-01689-HHK

RICK HARRISON

Plaintiff(s)

vs.

REPUBLIC OF SUDAN

Defendant(s)

CERTIFICATE OF MAILING

I hereby certify under penalty of perjury, that on the day of 17th day of November, 2010, I mailed:

1. ☐ One copy of the summons and complaint by registered mail, return receipt requested, to the individual of the foreign state, pursuant to the provisions of FRCP 4(f)(2)(C)(ii).

2. ☒ One copy of the summons, complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by registered mail, return receipt request, to the head of the ministry of foreign affairs, pursuant to the provisions of 28 U.S.C. § 1608(a)(3).

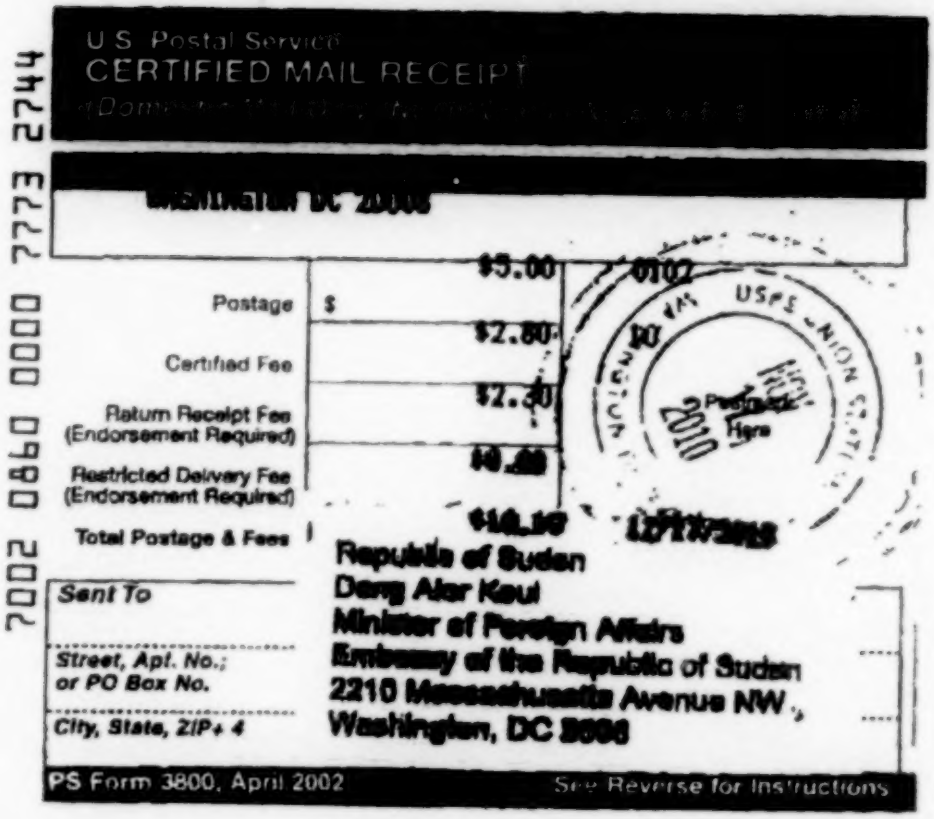
3. ☐ Two copies of the summons, complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by certified mail, return receipt requested, to

the U.S. Department of State, Office of Policy Review and Interagency Liaison, Overseas Citizens Services, 2100 Pennsylvania Avenue, NW, Fourth Floor, Washington, DC 20520, ATTN: Director of Overseas Citizens Services, pursuant to the provisions of 28 U.S.C. § 1608(a)(4).

4. ☐ One copy of the summons and complaint, together with a translation of each into the official language of the foreign state, by registered mail, return receipt requested, to the agency or instrumentality of the foreign state, pursuant to 28 U.S.C. § 1608(b)(3)(B).

ANGELA D. CAESAR, CLERK

By: Daniel J. Reidy
Deputy Clerk



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Bankruptcy Courts

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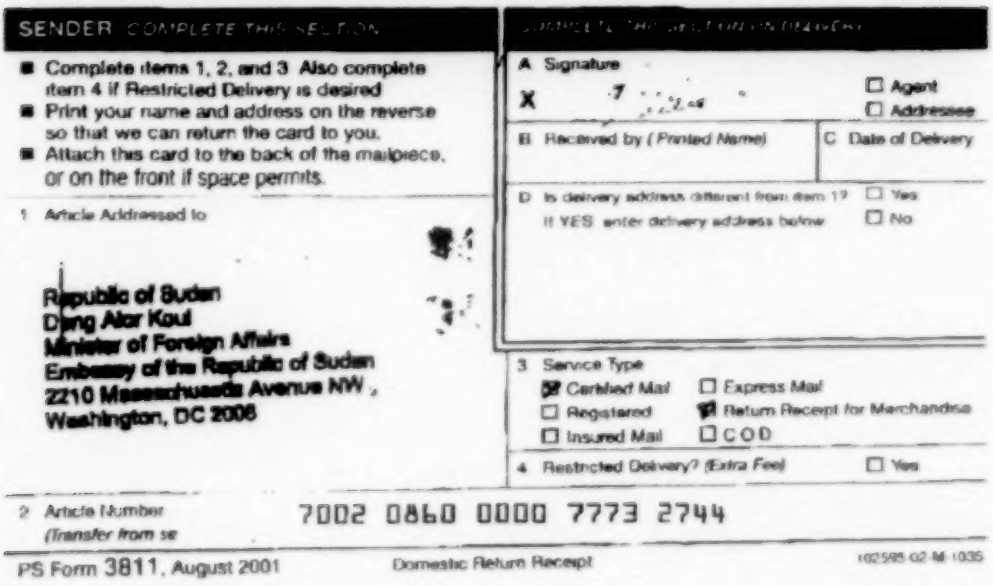
NOV 23 2010

Angela D. Caesar, Clerk of Court

US District Court, District of Columbia

10-CV-1689 (HHK)



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Dieng Alor Koul
Minister of Foreign Affairs
Embassy of the Republic of Sudan
2210 Massachusetts Avenue NW,
Washington, DC 2008

A Signature

X [illegible] ☐ Agent ☐ Addressee

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APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed 11/06/2015]

Docket No. 14-121

RICK HARRISON, JOHN BUCKLEY, III, MARGARET LOPEZ, ANDY LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARD LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE REPUBLIC OF SUDAN'S PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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Plaintiffs-Appellees,

v.

REPUBLIC OF SUDAN,

Defendant-Appellant,

ADVANCED CHEMICAL WORKS, aka ADVANCED COMMERCIAL AND CHEMICAL WORKS COMPANY LIMITED, aka ADVANCED TRAINING AND CHEMICAL WORKS COMPANY LIMITED, ACCOUNTS & ELECTRONICS EQUIPMENTS, aka ACCOUNTS AND ELECTRONICS EQUIPMENTS, *et al.*,

Defendants,

NATIONAL BANK OF EGYPT, CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK,

Respondents.

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Interest of the United States

The panel construed the Foreign Sovereign Immunities Act ("FSIA") to allow service on a foreign sovereign via its embassy in the United States if the papers are addressed to the foreign minister. That holding runs contrary to the FSIA's text and history, and is inconsistent with the United States' international treaty obligations and international practice. The United States has a substantial interest in ensuring that foreign states are served properly before they are required to appear in U.S. courts, and preserving the inviolability of diplomatic missions under the Vienna Convention on Diplomatic Relations ("VCDR"). Moreover, the government routinely objects to attempts by foreign courts and litigants to serve the U.S. government by direct delivery to an American embassy, and thus has a significant reciprocity interest in the treatment of U.S. missions abroad. The United States deeply sympathizes with the extraordinary injuries to the U.S. military personnel and their spouses who brought this suit, and condemns the terrorist acts that caused those injuries. Nevertheless, because of the government's interest in the proper application of rules regarding service of process on foreign states, as well as significant reciprocity concerns, the United States submits this brief as *amicus curiae* pursuant to Federal Rule of Appellate Procedure 29(a) in support of rehearing.

ARGUMENT

Point I—The Panel Incorrectly Permitted Service Through a Foreign State's Embassy

The panel incorrectly construed § 1608(a)(3) of the FSIA to permit service upon foreign states by allowing U.S. courts to enlist foreign diplomatic facilities in the

U.S. as agents for delivery to those sovereigns' foreign ministers. That method of service contradicts the FSIA's text and history, and is inconsistent with the United States' international obligations.

The FSIA sets out the exclusive procedures for service of a summons and complaint on a foreign state and provides that, if service cannot be made by other methods, the papers may be served "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. § 1608(a)(3). The most natural understanding of that text is that the mail will be sent to the head of the ministry of foreign affairs at his or her regular place of work—*i.e.*, at the ministry of foreign affairs in the state's seat of government—not to some other location for forwarding. *See, e.g.*, *Barot v. Embassy of Republic of Zambia*, 785 F.3d 26, 30 (D.C. Cir. 2015) (directing service to be sent to foreign minister in state's capital city).[1]

The panel observed that § 1608(a)(3) does not expressly specify a place of delivery for service on a foreign minister, and assumed that mailing to the embassy "could reasonably be expected to result in delivery to the intended person." (Slip op. 13). But the FSIA's service provisions "can only be satisfied by strict compliance." *Magness v. Russian Fed'n*, 247 F.3d 609, 615 (5th Cir. 2001); *accord Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994). It is inconsistent with a rule of strict compliance

---

[1] Thus, a witness in congressional hearings described § 1608(a)(3) as requiring service by "mail to the foreign minister at the foreign state's seat of government." Hearings on H.R. 11315 Before Subcomm. on Admin. Law and Gov'tl Rels. of House Comm. on Judiciary (June 4, 1976) (testimony of M. Cohen).

to permit papers to be mailed to the foreign minister at a place other than the foreign ministry, even if the mailing is nominally addressed to that person, based on the assumption it will be forwarded.

The Court supported its conclusion by contrasting § 1608(a)(3)'s silence regarding the specific address for mailing with § 1608(a)(4)'s provision that papers be mailed to the U.S. Secretary of State "in Washington, [D.C.]," and inferring that Congress therefore did not intend to require mailing the foreign minister at any particular location. (Slip op. 12). But a separate contrast in the statute undermines that conclusion. For service on a foreign state agency or instrumentality, Congress expressly provided for service by delivery to an "officer, a managing or general agent, or to any other [authorized] agent." § 1608(b)(2). In contrast, for service on the foreign state itself, Congress omitted any reference to an officer or agent. *Id.* § 1608(a). That difference strongly suggests that Congress did not intend to allow service on a foreign state via delivery to any entity that could, by analogy, be considered the foreign state's officer or agent, including the state's embassy, even if only for purposes of forwarding papers to the foreign ministry.

The FSIA's legislative history makes clear that Congress did not intend for service to be made via direct delivery to an embassy, and spells out significant legal and policy concerns with such an approach. The panel acknowledged that the relevant House report explicitly stated that "'[s]ervice on an embassy by mail would be precluded under this bill.'" (Slip op. 15-16 (quoting H.R. Rep. No. 94-1487, at 26 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6625)). The panel was persuaded that this language did not reflect Congress's intent to preclude service by delivery to a foreign minister

"*via* or *care of* an embassy," as opposed to precluding service "on" the embassy if, for example, the suit is against the embassy. But suits against diplomatic missions are also suits against foreign states for purposes of the FSIA, *see Gray v. Permanent Mission of People's Republic of Congo*, 443 F. Supp. 816 (S.D.N.Y. 1978), *aff'd*, 580 F.2d 1044 (2d Cir. 1978), and there is no rationale for prohibiting service of papers at an embassy only in cases where the embassy is the named defendant.

Additional legislative history confirms that Congress was concerned about allowing foreign states to be served at their embassies. Early drafts of the FSIA provided for mailing papers to foreign ambassadors in the United States as the primary means of service on a foreign state. *See* S. 566, 93rd Cong. (1973); H.R. 3493, 93rd Cong. (1973). But, at the urging of the State Department, Congress removed any reference to ambassadors from the final service provisions, to "minimize potential irritants to relations with foreign states," particularly in light of concerns about the inviolability of embassy premises under the VCDR. H.R. Rep. No. 94-1487, at 11, 26.

Indeed, the panel's decision is contrary to the principle of mission inviolability and the United States' treaty obligations. The VCDR provides that "the premises of the mission shall be inviolable." 23 U.S.T. 3227, 500 U.N.T.S. 95, art. 22. As this Court has correctly concluded in an analogous context, this principle must be construed broadly, and is violated by service of process—whether on the inviolable diplomat or mission for itself or "as agent of a foreign government." *Tachiona v. United States*, 386 F.3d 205, 222, 224 (2d Cir. 2004); *accord Autotech Tech. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 748 (7th Cir.

to permit papers to be mailed to the foreign minister at a place other than the foreign ministry, even if the mailing is nominally addressed to that person, based on the assumption it will be forwarded.

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2007) ("service *through* an embassy is expressly banned" by VCDR and "not authorized" by FSIA (emphasis added)); *see 767 Third Ave. Assocs. v. Permanent Mission of Zaire*, 988 F.2d 295, 301 (2d Cir. 1993) (approvingly noting commentator's view that "process servers may not even serve papers without entering at the door of a mission because that would 'constitute an infringement of the respect due to the mission'"); Brownlie, *Principles of Public Int'l Law* 403 (8th ed. 2008) ("writs may not be served, even by post, within the premises of a mission but only through the local Ministry for Foreign Affairs."). The intrusion on a foreign embassy is present whether it is the ultimate recipient or merely the conduit of a summons and complaint.

The panel's contrary conclusion also improperly allows U.S. courts to treat the foreign embassy as a forwarding agent, diverting its resources to determine the significance of the transmission from the U.S. court, and to assess whether or how to respond. The panel assumed that the papers would be forwarded on to the foreign minister via diplomatic pouch, which is provided with certain protections under the VCDR to ensure the safe delivery of "diplomatic documents and articles intended for official use." VCDR, art 27. But one sovereign cannot dictate the internal procedures of the embassy of another sovereign, and a foreign government may well object to a U.S. court instructing it to use its pouch to deliver items to its officials on behalf of a third party.

Finally, the United States has strong reciprocity interests at stake. The United States has long maintained that it may only be served through diplomatic channels or in accordance with an applicable international convention or other agreed-upon method. Thus,

the United States consistently rejects attempted service via direct delivery to a U.S. embassy abroad. When a foreign court or litigant purports to serve the United States through an embassy, the embassy sends a diplomatic note to the foreign government indicating that the United States does not consider itself to have been served properly and thus will not appear in the case or honor any judgment that may be entered. That position is consistent with international practice. *See* U.N. Convention on Jurisdictional Immunities of States and Their Property, UN Doc. A/59/508 (2004), art. 22 (requiring service through international convention, diplomatic channels, or agreed-upon method); European Convention on State Immunity, 1495 U.N.T.S. 181 (1972), art. 16 (service exclusively through diplomatic channels); U.K. State Immunity Act, 1978 c.33 (same). If the FSIA were interpreted to permit U.S. courts to serve papers through an embassy, it could make the United States vulnerable to similar treatment in foreign courts, contrary to the government's consistently asserted view of the law. *See, e.g.*, *Medellín v. Texas*, 552 U.S. 491, 524 (2008) (U.S. interests including "ensuring the reciprocal observance of the Vienna Convention [on Consular Relations]" are "plainly compelling"); *Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1295 (11th Cir. 1995) (FSIA's purposes include "according foreign sovereigns treatment in U.S. courts that is similar to the treatment the United States would prefer to receive in foreign courts").

Point II—The FSIA Does Not Override the Requirement of an OFAC License

Although Sudan's petition for rehearing does not rely on this issue, the panel also erred in suggesting

plaintiffs need not obtain an OFAC license before executing upon blocked assets under the FSIA.

As the panel noted (slip op. 22-23), the United States has repeatedly taken the position that section 201(a) of the Terrorism Risk Insurance Act ("TRIA") permits a person holding a judgment under 28 U.S.C. § 1605A to attach assets that have been blocked pursuant to certain economic sanctions laws, without obtaining an OFAC license. That position rests on the terms of TRIA, which permits attachment of blocked assets in specified circumstances "[n]otwithstanding any other provision of law." TRIA § 201(a).

But the panel erroneously applied the same construction to § 1610(g) of the FSIA. (Slip op. 22 (addressing "whether § 201(a) of the TRIA *and § 1610(g) of the FSIA*" permit § 1605A judgment holder to attach blocked assets without OFAC license) (emphasis added), 25 (turnover proper because execution sought "pursuant to the TRIA and 28 U.S.C. § 1610(g)")). As the United States has previously stated, where "funds at issue fall outside TRIA but somehow are attachable by operation of the FSIA alone . . . an OFAC license would be required before the funds could be transferred to plaintiffs." Statement of Interest of United States, *Wyatt v. Syrian Arab Republic*, No. 08 Civ. 502 (D.D.C. Jan. 23, 2015), at 18. While § 1610(g)(2) provides that certain property of a foreign state "shall not be immune from attachment," that language, consistent with the paragraph's title ("United States sovereign immunity inapplicable"), merely removes a defense of sovereign immunity. Section 1610(g) lacks TRIA's broad "notwithstanding any other provision" language, and does not override other applicable rules such as the need for an OFAC license. *See* 31 C.F.R. §§ 538.201(a), 538.313.

Dated: New York, New York
November 6, 2015

Respectfully submitted,

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No. 16-2267

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[Filed 02/07/2017]

AVINESH KUMAR, et al.,
Plaintiffs-Appellees,

v.

REPUBLIC OF SUDAN,
Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of Virginia

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF REVERSAL

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INTEREST OF THE UNITED STATES

The district court construed the Foreign Sovereign Immunities Act (FSIA) to allow private parties to serve a foreign state by having process sent by mail to its embassy in the United States, if the papers are addressed to the foreign minister. That holding runs contrary to the FSIA's text, which must be understood in light of the United States' obligations under the Vienna Convention on Diplomatic Relations, as well as the statute's legislative history, which makes clear that Congress enacted the FSIA's service provision to avoid conflict with those treaty obligations. The United States has a substantial interest in preserving the inviolability of diplomatic missions pursuant to its international treaty obligations. Moreover, the government has an important interest in ensuring that foreign states are properly served before they are required to appear in U.S. courts. The United States routinely objects to attempts by foreign litigants to serve the United States through delivery of process to a United States embassy outside of diplomatic channels, and thus the government has a significant reciprocity interest in the treatment of United States missions abroad.

The United States deeply sympathizes with the extraordinary injuries suffered by the family members of the sailors killed in the bombing of the U.S.S. Cole. And the United States condemns in the strongest possible terms the terrorist acts that caused the sailors' deaths. Nevertheless, because of the government's interest in the proper application of rules regarding service of process on foreign states, the United States submits this brief as amicus curiae in support of reversal.

BACKGROUND

1. This case arises from al Qaeda's terrorist bombing of the U.S.S. Cole in the Port of Aden in Yemen on October 12, 2000. J.A. 440. The bombing killed seventeen sailors and injured forty-two others. J.A. 441. In 2010, family members of the seventeen sailors killed in the bombing brought suit against the Republic of Sudan under 28 U.S.C. § 1605A, the terrorism exception to foreign sovereign immunity, alleging that Sudan provided material support to the al Qaeda operatives who carried out the Cole bombing. *Id.*

Although the current suit began in 2010, the litigation has a much longer, complicated procedural history. In brief, certain plaintiffs initially brought suit in 2004. J.A. 441. Sudan failed to defend and the court entered a default judgment. J.A. 442. Sudan subsequently appeared, and the court granted Sudan's motion to vacate the default judgment. *Id.* After the district court denied Sudan's motion to dismiss the suit and this Court affirmed, Sudan withdrew from the suit and, in 2007, the district court again entered a default judgment. J.A. 442-43. The district court awarded economic but not punitive damages, and the plaintiffs appealed. J.A. 443.

While the case was on appeal, in 2008, Congress amended the terrorism exception of the FSIA to, among other things, create a federal cause of action and to provide for punitive damages. J.A. 443. In 2010, plaintiffs brought a new suit under the amended terrorism exception. J.A. 444-45. Sudan continued to refuse to participate in the litigation. J.A. 445. After a bench trial in 2014, the district court found that Sudan's provision of material support to al Qaeda led to the killing of the seventeen sailors, and, in March 2015, it entered a default judgments against Sudan and

awarded damages, including punitive damages, to the plaintiffs. *Id.*

2. In April 2015, Sudan entered an appearance in the case and filed a motion to vacate the default judgments under Federal Rules of Civil Procedure 55(c) (authorizing a court to set aside a nonfinal default for good cause) or 60(b) (authorizing a court to set aside a final judgment under specified circumstances). The district court denied the motion. J.A. 446-47.

As relevant to the issue addressed in this brief, Sudan argued that the judgments were void under Rule 60(b)(4) because the district court lacked personal jurisdiction. J.A. 467; see *Wendt v. Leonard*, 431 F.3d 410, 412 (4th Cir. 2005) ("An order is 'void' for purposes of Rule 60(b)(4) only if the court rendering the decision lacked personal or subject matter jurisdiction or acted in a manner inconsistent with due process of law."). It is undisputed that the plaintiffs purported to serve Sudan by having process mailed to Sudan's embassy in Washington, D.C., addressed to the Sudanese foreign minister. J.A. 467. The plaintiffs relied on a provision of the FSIA that authorizes service:

> by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.

28 U.S.C. § 1608(a)(3); see J.A. 467.

Sudan argued that Section 1608(a)(3) does not permit service on a foreign state through its embassy.

J.A. 467. In support of that argument, Sudan argued that service on a foreign state at one of its foreign missions is prohibited by Article 22 of the Vienna Convention on Diplomatic Relations (VCDR), *done* April 18, 1961, 23 U.S.T. 3227, 3237, 500 U.N.T.S. 95, 104, which provides that "the premises of the mission shall be inviolable." See J.A. 469. Sudan further relied on the United States' amicus curiae brief filed in support of Sudan's petition for rehearing in *Harrison v. Republic of Sudan*, 838 F.3d 86 (2d Cir. 2016) (No. 15-121), in which the government argued that a private party's service by mail on a foreign mission is inconsistent with the FSIA's text and history, conflicts with the United States' treaty obligations relating to the inviolability of missions, and compromises the United States' ability to reject such service on its embassies. J.A. 469.

The district court held, however, that Section 1608(a)(3) permits a litigant to serve a foreign state by having process mailed to a state's foreign mission because "the statute does not prescribe the place of service, only the person to whom process must be served." J.A. 468 (quotation marks omitted). Relying on the Second Circuit's opinion denying panel rehearing in *Harrison*, the district court held that mission inviolability was not compromised because service was on the foreign minister, not the foreign mission, and because Sudan consented to service through its mission by accepting the package. J.A. 469. For these reasons, the district court held that the plaintiffs validly served Sudan, and it rejected Sudan's argument that the judgments were void because the court lacked personal jurisdiction. *Id.*

ARGUMENT

THE FOREIGN SOVEREIGN IMMUNITIES ACT DOES NOT PERMIT A LITIGANT TO SERVE A FOREIGN STATE BY HAVING PROCESS ADDRESSED TO THE FOREIGN MINISTER MAILED TO THE STATE'S EMBASSY IN THE UNITED STATES

1. The FSIA provides the sole basis for civil suits against foreign states and their agencies or instrumentalities in United States courts. The FSIA establishes the rule that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided" by the statute. 28 U.S.C. § 1604. If a suit comes within a statutory exception to foreign sovereign immunity, the FSIA provides for subject matter jurisdiction in the district courts. 28 U.S.C. § 1330(a). The statute provides for personal jurisdiction over the foreign state in such suits "where service has been made under section 1608." 28 U.S.C. § 1330(b).

Section 1608 provides the exclusive means for serving a foreign state in civil litigation. See Fed. R. Civ. P. 4(j)(1) ("A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608."). Section 1608(a) provides for service on "a foreign state or political subdivision of a foreign state." Section 1608(b) provides for service on "an agency or instrumentality of a foreign state." Both subsections specify hierarchical methods of service. First, service must be effected on a foreign state or its agency in accordance with any "special arrangement for service" between the plaintiff and the foreign state or agency. 28 U.S.C. § 1608(a)(1), (b)(1). If no such special arrangement exists, then service must be

provided "in accordance with an applicable international convention on service of judicial documents" or, in the case of an agency or instrumentality, on any agent authorized to receive service on behalf of the agency in the United States. *Id.* § 1608(a)(2), (b)(2).

If service cannot be made by one of those methods, then Section 1608 provides for service by delivery. The delivery provisions applicable to foreign states and to their agencies or instrumentalities differ in an important respect, however. While Section 1608(b)(3) authorizes service on a foreign state agency by delivery "if reasonably calculated to give actual notice," section 1608(a)(3) says nothing about actual notice. Instead, it authorizes service "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. § 1608(a)(3). In light of the differences between the text of the two delivery provisions, courts have concluded that a private party may serve a foreign state by delivery only through "strict compliance" with the terms of Section 1608(a). *Magness v. Russian Federation*, 247 F.3d 609, 615 (5th Cir. 2001); see also *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994); but see *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1129 (9th Cir. 2010) (upholding defective service on foreign state because of substantial compliance with Section 1608(a)(3)).[1]

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[1] By contrast, some courts have upheld service on agencies or instrumentalities of a foreign state based on "substantial compliance" with Section 1608(b)(3) combined with actual notice to the defendant. See *Straub v. A P Green, Inc.*, 38 F.3d 448, 453 (9th Cir. 1994); *Sherer v. Construcciones Aeronauticas, S.A.*, 987 F.2d

Finally, Section 1608(a) provides for a fourth method of service on a foreign state, if service cannot be made under the delivery provision within thirty days. In that case, a plaintiff may deliver process to the State Department for service on the foreign state through diplomatic channels. 28 U.S.C. § 1608(a)(4).

2. Section 1608(a)(3) does not permit a private party to serve a foreign state by having process mailed to the embassy of the foreign state in the United States, addressed to the minister of foreign affairs. See U.S. Department of State, Bureau of Consular Affairs, Foreign Sovereign Immunities Act, http://go.usa.gov/x9FGq ("Service on a foreign embassy in the United States or mission to the United Nations is not one of the methods of service provided in the FSIA.").

As noted, Section 1608(a)(3) authorizes service "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." Although the provision does not expressly identify the place of service, the most natural understanding of the provision is that it requires that service be delivered to "the ministry of foreign affairs of the foreign state" and addressed to the specified government official, the head of the ministry. Thus, naturally read, the provision requires delivery to the official's principal place of business, the ministry of foreign affairs in the foreign state's seat of government. A state's foreign minister does not work in the state's embassies. Had Congress contemplated delivery to embassies, it would have enacted a statute

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1246 (6th Cir. 1993); *Harris Corp. v. National Iranian Radio & Television*, 691 F.2d 1344 (11th Cir. 1982).

requiring service to be addressed to the foreign state's ambassador.

In construing Section 1608(a)(3), the D.C. Circuit has explained that the provision "mandates service on the Ministry of Foreign Affairs, the department most likely to understand American procedure." *Transaero*, 30 F.3d at 154; see also *Barot v. Embassy of Republic of Zambia*, 785 F.3d 26, 30 (D.C. Cir. 2015) (directing service to be sent "to the 'head of the ministry of foreign affairs' in Lusaka, Zambia, whether identified by name or title, and not to any other official or agency") (citing 28 U.S.C. § 1608(a)(3)). The D.C. Circuit's interpretation is particularly instructive because most suits against foreign states (as opposed to suits against foreign state agencies or instrumentalities) are brought in that circuit. See *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 332 (D.C. Cir. 2003) (describing the District of Columbia as "the dedicated venue for actions against foreign states") (quoting amicus brief); 28 U.S.C. § 1391(f)(4) (providing for venue in suits against a foreign state or political subdivision thereof in the United States District Court for the District of Columbia).

Construing Section 1608(a)(3) to require service on the foreign minister by delivery to the state's foreign ministry is consistent with the courts' recognition that Congress required strict compliance with the service-by-delivery provision applicable to foreign states. See *Magness*, 247 F.3d at 615; *Transaero*, 30 F.3d at 154. While Congress permitted delivery on foreign state agencies or instrumentalities so long as the delivery is "reasonably calculated to give actual notice," 28 U.S.C. § 1608(b)(3), the provision governing service-by-delivery on a foreign state makes no mention of actual notice, *id.* § 1608(a)(3). A state's foreign

minister's principal place of business is in the seat of government, not in the state's foreign embassies. Thus, a private party's service by mail or in person on a foreign minister at one of the state's embassies necessarily would require the further transmission of the summons and complaint to the foreign minister by the embassy staff. While the district court may have viewed that means of service as reasonably calculated to give actual notice to the foreign minister, that is insufficient for service by delivery under Section 1608(a)(3).

As we next show, the United States' treaty obligations and the FSIA's legislative history, which explains the statute's consistency with those treaty obligations, further support the understanding that Section 1608(a)(3) does not permit a private party to serve a foreign state by having process mailed to one of its embassies. Such service of process on a foreign mission would be inconsistent with the United States' treaty obligations. But because Section 1608(a)(3) may be interpreted to prohibit such service, it must be so construed. See Restatement (Third) of the Foreign Relations Law of the United States § 114 (Am. Law Inst. 1986) ("Where fairly possible, a United States statute is to be construed so as not to conflict with * * * an international agreement of the United States.") (Third Restatement); see also, *e.g.*, *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.").

Article 22, Section 1 of the VCDR provides that "the premises of the mission shall be inviolable." VCDR, *done* April 18, 1961, 23 U.S.T. 3227, 3237, 500 U.N.T.S. 95, 104. There is an international consensus

that a litigant's service of process through mail or personal delivery to a foreign mission is inconsistent with the inviolability of the mission enshrined in VCDR Article 22. The United Nations International Law Commission prepared the preliminary draft of the Vienna Convention and presented the draft to the United Nations member states for their consideration. Int'l L. Comm'n, Report of the Commission to the General Assembly, U.N. GAOR, 12th Sess., Supp. 9, U.N. Doc. A/3623 (1957), *reprinted in* [1957] 2 Y.B. Int'l L. Comm'n 131, 131, U.N. Doc. A/CN.4/SER.A/1957/Add.1, https://goo.gl/26RrG3 (Commission Report). In describing the almost identical provision that became Article 22, the International Law Commission explained that:

> [a] special application of this principle [of the inviolability of the premises of the mission] is that no writ shall be served within the premises of the mission, nor shall any summons to appear before a court be served in the premises by a process server. Even if process servers do not enter the premises but carry out their duty at the door, such an act would constitute an infringement of the respect due to the mission. All judicial notices of this nature must be delivered through the Ministry for Foreign Affairs of the receiving State.

Commission Report, [1957] 2 Y.B. Int'l L. Comm'n at 137.

The states that became parties to the VCDR have so understood Article 22, as is documented in numerous treatises describing state practice under the treaty. See, *e.g.*, Eileen Denza, *Diplomatic Law* 124 (4th ed. 2016) ("The view that service by post on mission premises is prohibited seems to have become generally

accepted in practice."); James Crawford, *Brownlie's Principles of Public International Law* 403 (8th ed. 2012) ("It follows from Article 22 that writs cannot be served, even by post, within the premises of a mission but only through the local Ministry for Foreign Affairs."); Ludwik Dembinski, *The Modern Law of Diplomacy* 193 (1988) ("[Article 22] implicitly also protects the mission from receiving by messenger or by mail any notification from the judicial or other authorities of the receiving State."). And, reflecting the international consensus, other nations' state immunity statutes do not authorize a litigant's service on a foreign state through mail or personal delivery to a foreign state's embassy, in the absence of express consent by the foreign state. See, *e.g.*, Act on the Civil Jurisdiction of Japan with respect to a Foreign State, Act No. 24 of 2009, art. 20 (Japan); Foreign States Immunity Law, 5769-2008, § 13 (Israel); *Foreign State Immunities Act 1985*, §§ 24, 25 (Austl.); State Immunity Act, R.S.C. 1985, c S-18, § 9 (Can.); Foreign States Immunities Act 87 of 1981, § 13 (S. Afr.); State Immunity Act 1978, c. 33, § 12 (U.K.).

Moreover, the Executive Branch has long and consistently construed Article 22, and the customary international law it codifies, as precluding a litigant from serving process by mail or personal delivery to a foreign embassy as a means of serving a foreign state. See *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 982 (D.C. Cir. 1965) (Washington, J., concurring) ("The establishment by one country of a diplomatic mission in the territory of another does not implicitly or explicitly empower that mission to act as agent of the sending state for the purpose of accepting service of process." (quoting Letter from Leonard C. Meeker, Acting Legal Adviser, to John W. Douglas, Assistant Attorney General, August 10, 1964)). The courts owe

deference to that interpretation. See *Abbott v. Abbott*, 560 U.S. 1, 15 (2010) ("It is well settled that the Executive Branch's interpretation of a treaty is entitled to great weight." (quotation marks omitted)).

In light of that longstanding understanding of the Vienna Convention, the United States routinely refuses to recognize the propriety of a private party's service through mail or personal delivery to a United States embassy. When a foreign litigant (or foreign court official on behalf of a foreign litigant) purports to serve the United States through its embassy, the embassy sends a diplomatic note to the foreign government explaining that the United States does not consider itself to have been served consistently with international law and thus will not appear in the litigation or honor any judgment that may be entered against it. For that reason, the United States has a strong interest in ensuring that its courts afford foreign states the same treatment the United States contends it is entitled to under the Vienna Convention. *Cf. Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984) (noting that, in construing the FSIA, courts should consider the United States' interest in reciprocal treatment abroad).

Reflecting the Executive Branch's understanding and international practice, United States courts have recognized that a private party's delivery of process to a foreign mission or ambassador in the United States for service on another is inconsistent with the concept of inviolability enshrined in the VCDR. Thus, the Seventh Circuit held invalid a private party's service on a foreign-state agency by delivery to the foreign state's embassy in the United States because "service through an embassy is expressly banned" by the VCDR. *Autotech Tech. LP v. Integral Research & Dev.*

Corp., 499 F.3d 737, 748 (2007). Similarly, the D.C. Circuit has held that a litigant's service of process on an ambassador "as an agent of his sending country" is inconsistent with the inviolability of diplomatic agents established by VCDR Article 29. *Hellenic Lines*, 345 F.2d at 980; see *id.* at 980 n.4.

In addition, the FSIA's legislative history expressly addresses and repudiates the idea that a litigant's service on a foreign state may be effected by delivery of process to its mission in the United States. The House Report's section-by-section analysis explains that, prior to the FSIA's enactment, some litigants attempted to serve foreign states by "mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state." H.R. Rep. No. 94-1487, at 26 (1976); see *id.* (describing such service as being of "questionable validity"). The report states that "Section 1608 precludes this method so as to avoid questions of inconsistency with section 1 of article 22 of the [VCDR], which entered into force in the United States on December 13, 1972. Service on an embassy by mail would be precluded under this bill." *Id.*

Because the VCDR prohibits a private party from serving a state by having process mailed to a foreign mission, because Section 1608(a)(3) may fairly be construed to prohibit such delivery, and because the FSIA's legislative history demonstrates Congress's intent to prevent private-party service on an embassy, the district court erred in concluding that plaintiffs had properly served the Republic of Sudan. *Charming Betsy*, 6 U.S. (2 Cranch) at 118; Third Restatement § 114.

3. Relying in part on the Second Circuit's decision in *Harrison v. Republic of Sudan*, the district court held that plaintiffs properly served Sudan because Section

1608(a)(3) "does not prescribe the place of service, only the person to whom process must be served." J.A. 468; see *id.* (citing 838 F.3d 86, 93 (2016)). But the Second Circuit's reasoning was that plaintiffs' service through "[a] mailing addressed to the minister of foreign affairs via Sudan's embassy in Washington, D.C." is permissible under the statute because it "could reasonably be expected to result in delivery to the intended person." *Harrison*, 838 F.3d at 90. That approach is legally erroneous. As we explained above, while Section 1608(b)(3) authorizes service on a foreign state *agency or instrumentality* by delivery "if reasonably calculated to give actual notice," section 1608(a)(3) does not permit service on a foreign state itself by delivery reasonably calculated to give notice.

In addition, in light of the United States' international treaty obligations and the FSIA's legislative history discussed above, Section 1608(a)(3) cannot plausibly be construed to permit a private party to serve a foreign state by delivering process to the foreign state's embassy. The Second Circuit believed that the House Report discussion of Section 1608 "fails to make the distinction at issue in the instant case, between '[s]ervice *on* an embassy by mail,' [H.R. Rep. No. 94-1487, at 26] (emphasis added), and service on a minister of foreign affairs *via* or *care of* an embassy." *Harrison*, 838 F.3d at 92. But the distinction between service "on" an embassy and service on a foreign minister "via" an embassy is a false one. In both cases, the suit is against the foreign state itself. See 28 U.S.C. § 1603(a); *El-Hadad v. United Arab Emirates*, 216 F.3d 29, 31-32 (D.C. Cir. 2000) (treating suit against foreign embassy as suit against foreign state for purposes of the FSIA). There is no statutory basis for prohibiting a plaintiff's service at an embassy when the plaintiff names a foreign state's embassy as the

defendant but not when the plaintiff instead names the foreign state.

Moreover, the Second Circuit plainly misconstrued the legislative history. The House Report unambiguously expressed disapproval for the method of "attempting to commence litigation against *a foreign state*" by "the mailing of a copy of the summons and complaint *to a diplomatic mission* of the foreign state." H.R. Rep. No. 94-1487, at 26 (emphasis added). Private parties' attempted service by mailing a summons and complaint to an embassy, however addressed, was the harm Congress sought to remedy in enacting Section 1608(a)(3).

That conclusion again is buttressed by the international obligation to respect mission inviolability. As discussed above, the House Report explains that Congress enacted Section 1608 to avoid inconsistency with VCDR Article 22(1), which provides categorically that "[t]he premises of the mission shall be inviolable," and which precludes a private party from making a foreign state a defendant in a suit through any type of service through mail or personal delivery to its embassy. The district court below and the Second Circuit in *Harrison* believed that service on a foreign minister sent to an embassy is not precluded by the inviolability of the mission because it is the foreign minister who is served, not the embassy. J.A. 469; 838 F.3d at 92. But that purported distinction reflects a misunderstanding of Article 22 and the concept of inviolability it embodies, as explained above. See also Eileen Denza, *Interaction Between State and Diplomatic Immunity*, 102 American Soc. of Int'l L. Proc. 111, 111 (2008) ("At the very outset of legal proceedings against a state there is the problem of service of process—proceedings against the defendant cannot be begun

through service on its embassy premises in the light of Article 22 of the Vienna Convention on Diplomatic Relations.").

The district court and the Second Circuit also believed that because an embassy employee had accepted the delivery of the service of process, the embassy had consented to receive service, even if service of process would otherwise be a violation of its inviolability. J.A. 469; 838 F.3d at 95 ("Here, the Sudanese Embassy's acceptance of the service package surely constituted 'consent.'"). Article 22(1) provides, however, that "[t]he premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent *of the head of the mission*." (emphasis added). There is no evidence in either this case or *Harrison* that the Ambassador consented to receive plaintiffs' service of process by mail delivery on behalf of the foreign minister or Sudan. Other embassy employees do not have authority under Article 22 to consent to an action that otherwise would be a breach of a foreign mission's inviolability.[2]

In short, the text of the FSIA, its legislative history, and the United States' international treaty obligations all support interpreting Section 1608(a)(3) as not permitting private parties to serve process on a foreign state through its embassy in the United States. Because plaintiffs in this case did not properly serve Sudan, the district court lacked personal jurisdiction.

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[2] When staff at United States embassies around the world sign for or accept delivery of packages, the United States does not consider that to amount to consent within the meaning of Article 22, nor as legally proper service of process upon the United States if such a package contains a summons and complaint not transmitted through diplomatic channels.

28 U.S.C. § 1330(b). Accordingly, the district court erred in denying Sudan's motion to vacate the judgments as void under Rule 60(b)(4). See *Wendt v. Leonard*, 431 F.3d 410, 412 (4th Cir. 2005).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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February 2017

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I further certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 4,556 words, according to the Microsoft Word count, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii).

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I hereby certify that on February 7, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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No. 16-1094

In The

Supreme Court of the United States

REPUBLIC OF SUDAN,

Petitioner,

v.

RICK HARRISON, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Second Circuit correctly held that Petitioners complied with the service requirements for service upon a foreign state, under 28 U.S.C. § 1608(a)(3), by mailing the service packet required thereunder with a return receipt requested to the head of Respondent Sudan's Ministry of Foreign Affairs via the Embassy of Sudan in Washington D.C., when the service packet was accepted, signed for, and never refused or returned.

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Respondents Rick Harrison, John Buckley III, Margaret Lopez, Andy Lopez, Keith Lorensen, Lisa Lorensen, Edward Love, Robert McTureous, David Morales, Gina Morris, Martin Songer Jr., Tracey Smith as personal representative of the Estate of Rubin Smith, Shelly Songer, Jeremy Stewart, Kesha Stidham, Aaron Toney, Eric Williams, and Carl Wingate, respectfully submit this Opposition to the Petition for a Writ of Certiorari (the "Petition") filed herein by Petitioner Republic of Sudan ("Sudan").

Introduction

Sudan's assertions that the Panel's Opinion is momentous and creates a circuit split are utterly contrived. None of the decisions relied upon by Sudan address the issue presented in the Petition, nor conflict with the Panel's opinion. As described below, in the only other instances in which federal courts have been presented with the question of whether service, under 28 U.S.C. § 1608(a)(3), on a foreign minister can be perfected by mailing a service package through the foreign state's embassy, the courts have held in accord with the Panel's Opinion. Further, Sudan, in a motion to vacate the Respondent's judgment, is currently seeking relief in the D.C. District Court that is duplicative of the relief it seeks in the Petition. Thus, the Petition presents no compelling issue for the Court and is a waste of the Court's time and resources.

REASONS FOR DENYING THE PETITION

I. Sudan Has Filed a Motion to Vacate the Respondents' Judgment in the United States District Court for the District of Columbia that Remains Pending, on the Same Grounds as Argued in the Current Petition

Sudan's Petition in this matter is a needless waste of the Court's time and resources. It has filed a motion to vacate the Respondents' judgment that is fully briefed and currently pending in the U.S. District Court for the District of Columbia, in *Harrison, et al. v. Republic of Sudan*, Case No. 1:10-cv-01689 ("Motion to Vacate"). *See* Case No. 1:10-cv-01689, Dkt. No. 56. In its Motion to Vacate, Sudan advances the same arguments regarding purported improper service, under 28 U.S.C. § 1608(a)(3), that it presents in this Petition. *Id.* at 29-31. Because Sudan continues to pursue this issue in the District Court, this Petition is neither necessary or appropriate and should be denied.

As it was the court that initially heard the case and rendered judgment, it is appropriate for the D.C. District Court to determine whether it had subject matter jurisdiction over the action at its inception. This is particularly true given that Sudan continues to present purported evidentiary issues regarding service that were never raised in the District Court below. *See* Petition at p. 9-10; *see also Harrison v. Republic of Sudan*, 838 F.3d 86, 96 (2d Cir. 2016) ("The factual challenge should have been raised

during the five years that the case was pending in the district courts.").

Specifically, Sudan asserts that the service packet was not delivered to the Sudanese Embassy and that the minister of foreign affairs was not the person named by the Respondents in the service packet at the time of delivery of the service documents. *See* Petition at p. 9-10. These evidentiary issues were not raised in the Southern District of New York and, in fact, were not raised in any of Sudan's briefs on appeal, at oral argument, or in its petition for rehearing, with the arguments appearing for the first time in its reply brief in support of its petition for rehearing. *See Harrison*, 838 F.3d at 96. The Respondent's strongly dispute these evidentiary issues, which contradict prior statements made by Sudan in its briefs and at oral argument.[1] *See* Respondent's Motion for Leave to File Sur-Reply, Appeal No. 14-121, Dkt. No. 119.

Notwithstanding that these issues are disputed, Sudan's arguments were inappropriately raised for the first time on appeal. 838 F.3d at 96 ("'[F]actfinding is the basic responsibility of district courts, rather than appellate courts, and ... the Court of Appeals should not ... resolve[] in the first instance [a] factual dispute which ha[s] not been considered by the District Court.'") (quoting *DeMarco v. United States*, 415 U.S. 449, 450 n.* (1974)). Just as the

[1] At oral argument, Sudan argued that the Respondent's service packet had been intentionally withheld from the Ministry of Foreign Affairs by a South Sudanese contingent of the then coalition government, the Sudanese People's Liberation Movement, that was in control of Sudanese Embassy at the time service was made. *See Harrison v. Republic of Sudan*, 802 F.3d 399, 403 n.5 (2d Cir. 2015).

Second Circuit refused to consider these issues for the first time on appeal, so should the Court decline to address the arguments raised in the Petition. *See Pullman-Standard v. Swint*, 456 U.S. 273, 293 (1982) (reversing decision of the Fifth Circuit Court of Appeals for making factual determinations for the first time on appeal).

Further, Sudan argues in the Petition that the decisions of the D.C. Circuit, in *Barot v. Embassy of the Republic of Zambia*, 785 F.3d 26 (D.C. Cir. 2015) and *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148 (D.C. Cir. 1994), favor its position and conflict with the Panel's Opinion. *See* Petition at p. 14-15. While the Respondents dispute that the D.C. Circuit's decisions cited by Sudan favor it in any way, these arguments remain pending in Sudan's Motion to Vacate before the D.C. District Court.

Sudan has engaged in forum shopping since its first appearance in this case and has continued to press its arguments in whatever court appears most advantageous to it at the time.[2] The Court should not countenance Sudan's attempt to continue to litigate the same issues it is presenting in the Petition in the D.C. District Court and deny Sudan's Petition accordingly.

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[2] Sudan appeared and filed its Motion to Vacate in the D.C. District Court, more than a year after it filed its notice of appeal to the Second Circuit and only after oral argument had taken place in the appeal. *Compare* Case No. 1:10-cv-01689, Dkt. No. 56; *with* Appeal No. 14-121, Dkt. Nos. 1 and 67.

II. There Is No Conflict Between the Second Circuits' Decision and the Decisions of Any Other Circuit

Faced with the fact that no court has ever held that mailing a service package to the minister of foreign affairs through the foreign state's embassy fails to comply with the requirements of 28 U.S.C. § 1608(a)(3), Sudan instead employs a strawman argument by asserting that mailing the service package to foreign minister via the embassy is the equivalent of directly serving the embassy or a consular official. This argument is a sham and is being used solely in an attempt to manufacture a circuit split where no actual cases exist that are in conflict with the Panel's Opinion.

The Respondents did not serve the service package on the Embassy of Sudan or a Sudanese consular official. The service package was addressed specifically by name to Sudan's Minister of Foreign Affairs with direct notation of his title as the Minister of Foreign Affairs and had a return address of the clerk of the District Court. *Harrison*, 838 F.3d at 92 ("Here, the summons and complaint were addressed to the Sudanese Minister of Foreign Affairs, by name and title, at the Sudanese Embassy."). As they had done in the past, an official at Sudan's Embassy accepted and executed a return receipt for the service package, which stated in bold type that the addressee was the Minister of Foreign Affairs. *Id.* ("The embassy accepted the papers, signing for them and sending back a return receipt to the Clerk of Court."). The Sudanese Embassy official did not reject the

mailing as being improperly addressed, as it easily could have done.

The Court should not countenance this strawman argument, which has no bearing on the actual issue presented in the Petition. As described below, in the rare instances where the issue has been presented, the only court's to considerate it have found Sudan's argument untenable.

A. Service Via Mail, under 28 U.S.C. § 1608(a)(3), Is Distinguishable from Service Directly Upon an Embassy or Consular Official Because the Attempted Service Fails If the Service Packet Is Rejected or Returned

As the Second Circuit correctly noted, mailing a service package addressed to the foreign state's minister of foreign affairs through the state's embassy is not equivalent to directly serving the embassy or a consular official. *Harrison*, 838 F.3d at 92 ("There is a significant difference between *serving process* on an embassy, and mailing papers to a country's foreign ministry *via* the embassy."). If service were permitted directly on an embassy or consular official, which it is not, service would be perfected merely on delivery of the service documents to the embassy or official. As described below, under 28 U.S.C. § 1608(a)(3), service is not perfected on delivery of the service package alone. The service package must be accepted and not refused or returned. Sudan is well aware of this distinction and has availed itself of the ability to refuse service packages in the past. *See Opati v.*

Republic of Sudan, 978 F. Supp. 2d 65, 67 (D.D.C. 2013).

In a long line of cases, district courts have consistently held that where a service package served via mail, pursuant to 28 U.S.C. § 1608(a)(3), is refused or returned service is not perfected and the plaintiff must resort to service via diplomatic channels, under 28 U.S.C. § 1608(a)(4). *See Flanagan v. Islamic Republic of Iran*, 190 F. Supp. 3d 138, 151-53 (D.D.C. 2016) (holding service was not perfected as to Syria, under 28 U.S.C. § 1608(a)(3), because the service packet was refused, noting "[t]here exist at least half a dozen cases in which courts note that service under section 1608(a)(3) was ineffective precisely because service was refused"); *Opati*, 978 F. Supp. 2d at 67 (holding service on Sudan and Iran via mail, under 18 U.S.C. § 1608(a)(3), was defective when acceptance of the respective service packages were refused); *Murphy v. Islamic Republic of Iran*, 740 F. Supp. 2d 51, 67 (D.D.C. 2010) (holding service on Iran via mail, under 28 U.S.C. § 1608(a)(3), was defective because the service package was refused); *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 70 (D.D.C. 2010) (same); *Ben-Rafael v. Islamic Republic of Iran*, 540 F. Supp. 2d 39, 52 (D.D.C. 2008) (same); *Nikbin v. Islamic Republic of Iran*, 471 F. Supp. 2d 53, 60 (D.D.C. 2007) (same); *see also de Sousa v. Embassy of Republic of Angola*, CV 16-367 (BAH), 2017 WL 90330, at *5 (D.D.C. Jan. 9, 2017) (holding that while "refusal by an embassy to accept a package may defeat service under § 1608(a)(3)," service was perfected because the service package was accepted and signed for); *Karcher v. Islamic Republic of Iran*, CV 16-232 (CKK), 2017 WL 1401264, at *2 (D.D.C. Apr. 19, 2017)

(same); *Doe v. Holy See*, CIV.A. 13-128, 2014 WL 3909136, at *1 (E.D. La. Aug. 11, 2014) (noting where the plaintiff's service package mailed to the Holy See's Secretary of Relations with States, under 28 U.S.C. § 1608(a)(3), was returned to the clerk of court marked "refused," service by the clerk via diplomatic channels, under 28 U.S.C. § 1608(a)(4), was then attempted).

Recently, in *Flanagan*, Sudan argued that a co-defendant, Syria, had been effectively served via mail, under 28 U.S.C. § 1608(a)(3), even though the service package was returned with the notation that delivery was refused. 190 F.Supp.3d at 151. Upon reviewing the legislative history and numerous prior decisions on the issue, the D.C. District Court rejected Sudan's argument, holding that service defective, under 28 U.S.C. § 1608(a)(3), if the service package is returned as refused. *Id.* at 153 ("[T]he Court believes it unlikely that Congress envisioned service would be accomplished under section 1608(a)(3), and personal jurisdiction would attach over a foreign state, when service is returned as refused.").

Further, as noted in *Flanagan*, in *Opati v. Republic of Sudan*, Sudan had itself avoided service, under 28 U.S.C. § 1608(a)(3), by refusing to accept a mailed service package. *See Flanagan*, 190 F.Supp.3d at 152; *Opati*, at 67 ("Each mailing was refused by [Sudan and Iran], and the summonses returned unexecuted. [] Hence, Plaintiffs were unsuccessful in effecting service under section 1608(a)(3).").

Similarly, in *Kumar v. Republic of Sudan*, Case No. 2:10-cv-171 (E.D. Va.), Sudan, also, avoided service, under 28 U.S.C. § 1608(a)(3), by refusing to accept documents served by mail addressed to the

Minister of Foreign Affairs at the Embassy of Sudan. *See Harrison*, Appeal No. 14-121, Dkt. No. 104 at p. 11. Upon delivery of the *Kumar* plaintiffs' mailing, the Embassy official refused to accept the documents and directed them to be returned to sender, for which FedEx stated the reason as being "Address is correct/Recipient no longer at this address." *Id.*

Just as the D.C. District Court, in *Flanagan*, refused to accept Sudan's argument that service is perfected under 28 U.S.C. § 1608(a)(3), even when the service package is refused, so should the Court reject Sudan's conflation of service directly on an embassy or consular official with service mailed to the ministry of foreign affairs through an embassy. *See Flanagan*, 190 F.Supp.3d at 152-53. As the Second Circuit held, there is a clear distinction between such methods of service that renders Sudan's reliance on cases involving service directly on an embassy or consular official untenable. *Harrison*, 838 F.3d at 92 ("[T]he papers were not served on the embassy as a proxy or agent for Sudan, but they were instead mailed to the Minister of Foreign Affairs, in the most natural way possible—addressed to him, by name, via Sudan's embassy.").

B. The Purportedly Conflicting Decisions Cited by Sudan Address Service Made Directly Upon an Embassy or Consular Official, Not Service Via Mail, under 28 U.S.C. § 1608(a)(3), to the Minister of Foreign Affairs

Ignoring the actual issues decided by the Panel in the appeal below, Sudan cites to seven cases, *Barot v.*

Embassy of the Republic of Zambia, 785 F.3d 26 (D.C. Cir. 2015); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148 (D.C. Cir. 1994), cert. denied 513 U.S. 1150 (1995); *Magness v. Russian Federation*, 247 F.3d 609 (5th Cir. 2001); *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250 (7th Cir. 1983); *Autotech Technologies LP v. Integral Research & Dev. Corp.*, 499 F.3d 737 (7th Cir. 2007); *Ellenbogen v. The Canadian Embassy*, 2005 WL 3211428 (D.D.C Nov. 9, 2005); and *Lucchino v. Foreign Countries of Brazil, South Korea, Spain, Mexico, & Argentina*, 631 F. Supp. 821 (E.D. Pa. 1986), which it purports are in direct conflict with the Panel's Opinion. In reality, the foregoing cases stand for nothing more than the basic principle that service on a foreign state or its instrumentalities cannot be accomplished, under 28 U.S.C. § 1608(a)(3), by directly serving the foreign state's embassy or a consular official. As described below, none of the foregoing cases deal with the issue of whether mailing a service package to the minister of foreign affairs through the foreign state's embassy complies with the requirements of 28 U.S.C. § 1608(a)(3), nor do they conflict with the Panel's Opinion.

In *Barot*, the case principally relied upon by Sudan, the clerk of the district court, acting on behalf of a plaintiff proceeding *in forma pauperis*, attempted to serve a Title VII employment action against the Embassy of Zambia by mailing the service package to the Embassy of Zambia at the address of the Zambian Ministry of Foreign Affairs. 785 F.3d 26 at 27-28. The district court dismissed the plaintiff's complaint, holding that service was improper, under 28 U.S.C. § 1608(a)(3), because the package was not addressed to

the Zambian foreign minister. *Id.* at 28-29. On appeal, the D.C. Circuit reversed the district court's decision holding that it abused its discretion in dismissing the complaint, given the unusual procedural posture and its own involvement in the service errors. *Id.* at 29. It further held that the plaintiff should be given another opportunity to serve Zambia, but should ensure the mailing was addressed to the foreign minister, pursuant to § 1608(a)(3). *Id.* at 29-30. Nowhere in its opinion did the D.C. Circuit discuss the issue of whether a mailing addressed to the Zambian foreign minister through the Embassy of Zambia would have been proper method of service of the plaintiff's service package, under 28 U.S.C. § 1608(a)(3). The facts presented in *Barot* did not present that issue, nor even an analogous issue. *Barot*, like the other cases cited by Sudan, is nothing more than an example of an ill advised litigant making obvious errors in perfecting service on a foreign state.

In *Transero*, the D.C. Circuit held that the plaintiff's service of a complaint for breach of contract directly on the Bolivian Air Force, under 28 U.S.C. § 1608(b), was improper because the Bolivian Air Force was not an agency or instrumentality of Bolivia, but rather a "foreign state or political subdivision" that must be served in strict compliance with § 1608(a). 30 F.3d at 88. In light of this determination, the D.C. Circuit, in a divided panel, reversed the district court's decision that service had been perfected under the actual notice standard of § 1608(b). *Id.* at 91-92. It explicitly noted that the plaintiff "never attempted the methods of service prescribed in sections 1608(a)(3) and (a)(4)...." *Id.* at 91. Just as in *Barot*,

the D.C. Circuit did not address a service of process issue that is remotely like the one presented herein, even in passing or in dicta. Sudan's assertions that the *Transero* opinion conflicts with the Panel's Opinion are contrived and unsupportable.

In *Magness*, the Fifth Circuit held that the plaintiffs' mailing of service papers to the Texas Secretary of State for dispatch to Boris Yeltsin and directly to the Russian Deputy Minister of Culture did not comply with the service requirements of 28 U.S.C. § 1608(a)(3), for service on the Russian Federation. 247 F.3d at 613. The facts and issues discussed in the Fifth Circuit's opinion, which do not involve service on an embassy or consular official at all, are so disparate from those presented here and have so little bearing that it exemplifies Sudan's attempt to manufacture a circuit split. Again, there is no basis whatsoever for Sudan to argue that a conflict exists based on the opinion.

The plaintiff, in *Autotech*, attempted to serve a contempt order on the defendant, a company wholly owned by the state of Belarus, by directly serving the order on the ambassador of Belarus. 499 F.3d at 739, 748. The Seventh Circuit held that the plaintiff's service was defective because it did not comply with the requirements of 28 U.S.C. § 1608(b) for service on a foreign agency or instrumentality. *Id.* at 749. As such, the Seventh Circuit's holding stands for nothing more than the undisputed principle that a plaintiff cannot serve a foreign agency or instrumentality be directly serving the ambassador or embassy itself. *Id.* at 748-49. Sudan's repeated quotation of the words "service through an embassy" from the opinion is misleading at best, as the plaintiff did not attempt to

serve the Belarusian entity by transmitting the documents through the embassy or ambassador. *Id.* at 748 ("The only hint of service in the record is a copy indicating that there was service on the ambassador from Belarus."). The portion of the opinion quoted by Sudan only discusses service directly on a consular officer of legal documents that pertain to an agency or instrumentality of a foreign state. *Id.* at 748-749. It does not conflict with the Panel's Opinion and Sudan's assertions otherwise are not only incorrect, but also inappropriate.

In *Alberti*, the plaintiffs attempted to directly serve the ambassador of Nicaragua with a complaint seeking a declaratory judgment against an entity that had been nationalized by the government of Nicaragua, by mailing the complaint to the ambassador at the Nicaraguan Embassy. 705 F.2d at 252. On an refuted motion by the Republic of Nicaragua and the defendant entity, the district court dismissed the complaint on the grounds of failure to perfect service of process. *Id.* On appeal, the Seventh Circuit affirmed the dismissal, holding that the nationalized entity was a "foreign state" within the meaning of 28 U.S.C. § 1608 and that service was not perfected as required, under 28 U.S.C. § 1608(a)(3), because the complaint was served directly on the Nicaraguan ambassador. *Id.* at 253. Sudan's assertions that the Seventh Circuit's opinion is of great significance or conflicts with the Panel's Opinion, again, fails for the reason that the Seventh Circuit did not go beyond simply stating service directly on an ambassador is improper under § 1608(a)(3).

Similarly, in *Ellenbogen*, the plaintiff, who was attempting to sue the Canadian Embassy for age discrimination, served the embassy directly by personally mailing a copy of the summons and complaint to the Embassy. 2005 WL 3211428, at *1. The district court looked to whether the plaintiff had satisfied service under 28 U.S.C. § 1608(a)(3) because it was, in its judgment, the only provision that bore any resemblance to what the plaintiff had actually done. *Id.* Noting numerous procedural errors, including improperly directly serving the Embassy, the district court dismissed the case for failure to perfect service on the defendant. *Id.*

Like the plaintiff in *Ellenbogen*, the plaintiffs in *Lucchino*, attempted to directly serve Mexico's embassy and consulate with a complaint. 631 F.Supp. at 826-27. Just as in *Ellenbogen*, the district court noted other procedural errors, including failure to include a notice of suit, and held that service directly on an embassy does not comply with the requirements of 28 U.S.C. § 1608(a). The district court went no further than this holding and, as such, the decision does not conflict with the Panel's Opinion.

As described above, none of the cases cited by Sudan relate to the service issue presented in the Petition or conflict with the Panel's Opinion. *See Harrison*, 838 F.3d at 93 ("None of the cases relied on by Sudan or the United States undermines our reading of § 1608(a)(3)."). As such, Sudan's claim of a circuit split is undeniably false. Moreover, in the rare instances where the service issue raised in the Petition has actually been disputed, the courts faced with the issue have found Sudan's argument to be totally unavailing. *See Rux v. Republic of Sudan*,

Case No. 2:04CV428, 2005 WL 2086202 (E.D. Va. Aug. 26, 2005), *aff'd in part, appeal dismissed in part*, 461 F.3d 461 (4th Cir. 2006); *Wye Oak Technology v. Republic of Iraq*, 2010 WL 2613323 (E.D. Va. June 29, 2010).

In *Rux v. Republic of Sudan*, Sudan also argued that the plaintiffs therein failed to perfect service, under 28 U.S.C. § 1608(a)(3), because § 1608(a)(3) "requires that process be delivered directly to the Minister of Foreign Affairs in Sudan, as opposed to delivering it to him via that country's embassy." *See* 2005 WL 2086202, at *16. The district court squarely rejected Sudan's arguments, stating:

> Surely the legislature did not intend to designate the United States Postal Service or a commercial carrier as the preferred method of delivery to the Minister of Foreign Affairs. ***The text of 1608(a)(3) does not prohibit service on the Minister of Foreign Affairs at an embassy address. Indeed, the statute does not prescribe the place of service, only the person to whom process must be served.*** Sudan does not cite a single case in support of its position.

Id. (emphasis added). On appeal, the Fourth Circuit affirmed the district court, declining to review the issue of service under pendent appellate jurisdiction. *See Rux v. Republic of Sudan*, 461 F.3d 461, 474-75 (4th Cir. 2006).

Subsequently, in *Wye Oak*, the Republic of Iraq made a similar argument contesting that the plaintiff's service under 28 U.S.C. § 1608(a)(4) was improper because it claimed service had never been

properly attempted or made pursuant to § 1608(a)(3). 2010 WL 2613323, at *5-6. Specifically, Iraq argued in a motion to dismiss that service made under subsection (4) was premature because the plaintiff had not complied with subsection (3) because it caused the service package to be mailed to the Iraqi Embassy in Washington, D.C, rather than directly to the Ministry of Foreign Affairs in Iraq. The *Wye Oak* Court, rejected the argument that service to the Iraqi Minister of Foreign Affairs through the Embassy did not comply with subsection (3), stating:

> The Court concludes that the attempted service through the Embassy does not render service ineffective in this case. ... ***Section (a)(3) does not impose a requirement that an otherwise proper service package must be delivered to a particular destination.*** No doubt, the address to which the service package is directed must bear some objectively reasonable relationship to the head of the Ministry of Foreign Affairs and the chosen method of delivery must have some reasonable expectation of success. However, there is nothing on the face of Section (a)(3) that prohibits Wye Oak's chosen method of delivery to the head of the Ministry of Foreign Affairs and, for that reason, there was no requirement in Section (a)(3) with which Wye Oak failed to "strictly" comply.

Id. at *5 (emphasis added).

In light of the foregoing, it is clear that there is no circuit split and that the few courts that have considered the issue presented by the Petition have

issued decisions that accord with the opinion and reasoning of the Panel.

III. The Vienna Convention Prohibits Service on an Embassy or Consular Official, Not Service Via Mail Forwarded by an Embassy

Contrary to Sudan's arguments the Panel's Opinion and the *Rux* and *Wye Oak* Court's holdings do not violate the sanctity of the embassy embodied in the Vienna Convention on Diplomatic Relations by causing foreign embassies to become proxies of the minister of foreign affairs for the purpose of service of process. As stated above, if a foreign state objects to accepting a mailing to their foreign minister through their embassy, they can simply refuse the mailing, just as Sudan did in the *Opati* and *Kumar* cases. Moreover, neither the legislative history, nor the plain language of the 28 U.S.C. § 1608 indicate that Congress has determined service of process to a minister of foreign affairs through an embassy to be improper. Sudan's argument to the contrary is baseless and has been rejected by every court that has considered it.

As held by the Panel, in the legislative history of the FSIA cited by Sudan, Congress was concerned with service of process directly on an embassy or consular official, not whether documents could be mailed to a foreign official through an embassy. *See* 838 F.3d at 92 ("The legislative history does not address, any more than does the statutory text, whether Congress intended to permit the mailing of service to a foreign minister via an embassy.").

If Congress had wanted the service package to only be mailed directly to the ministry at its location in a foreign state, it would have stated such as much in the text of the statute. *See Harrison*, 802 F.3d at 404. The Panel correctly observed that in the immediately following clause, § 1608(a)(4), Congress specified that the service package was to be mailed "to the Secretary of State, in Washington, District of Columbia." *Harrison*, 802 F.3d at 404 ("If Congress had wanted to require that the mailing be sent to the head of the ministry of foreign affairs in the foreign county, it could have said so. In § 1608(a)(4), for example, Congress specified that the papers be mailed 'to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services,' for transmittal to the foreign state 'through diplomatic channels.'") (emphasis in original).

For Sudan's argument to succeed, the Court would be required to rewrite the statute by inserting new requirements and then retroactively penalize the Respondents for failing to meet those new requirements. The Court cannot add new requirements to an existing statute, particularly where the plain language is clear. *See Burrage v. U.S.*, 134 S. Ct. 881, 892 (2014) ("The role of this Court is to apply the statute as it is written - even if we think some other approach might 'accor[d] with good policy.'") (quoting *Commissioner v. Lundy*, 516 U.S. 235, 252, (1996)); *see also Jacobs v. New York Foundling Hosp.*, 577 F.3d 93, 99 (2d Cir. 2009) ("It is not our place as jurists to supply that which is omitted by the legislature.") (quoting *Spielman v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 332 F.3d 116,

127 (2d Cir. 2003)); *see also Matter of Greenway*, 71 F.3d 1177, 1180 (5th Cir. 1996) ("It is not the job of the courts to legislate, and the Supreme Court has counseled that where the statutory language is plain, 'the sole function of the court is to enforce it according to its terms.'") (quoting *U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)).

Notwithstanding the clear language of the statute, subsequent to the *Rux* decision, 2005 WL 2086202, at *16, Congress revised the FSIA, in the National Defense Authorization Act for Fiscal Year 2008, Pub.L. No. 110–181, to address problems related to suits filed pursuant to the former terrorism exception to sovereign immunity, 28 U.S.C. § 1605(a)(7). *See Owens v. Sudan*, 826 F. Supp. 2d 128, 147 (D.D.C. 2011). Where Congress "adopts a new law incorporating sections of a prior law ..., Congress normally can be presumed to have had knowledge of the [judicial] interpretation given to the incorporated law..." *Lorillard v. Pons*, 434 U.S. 575, 581 (U.S. 1978). As such, Congress was presumptively aware of the decision in *Rux*, but did not amend § 1608(a)(3) to require service to be made only on the ministry in the foreign state.

Just as in its argument that there is a circuit split, Sudan's argument that the Panel's Opinion violates the Vienna Convention is based entirely on authority that states nothing more than that service cannot be perfected by directly serving an embassy or consular official. Neither the legislative history of 1608(a), nor its plain language supports Sudan's argument that service mailed via an embassy violates that prohibition. Congress could have specified the mailing of the service package must be directed to the

ministry's address in the foreign state, but it did not do so. In light of the language of § 1608(a)(4) and the history of decisions approving of the Respondent's method of service, it is clear that Congress deemed such service proper and in accord with the Vienna Convention.

Conclusion

Contrary to Sudan's assertions, the Panel's Opinion affirming the district court's turnover orders is neither momentous or in conflict with the decisions of any other Circuit. Further, Sudan continues to simultaneously pursue relief in the D.C. District Court that is duplicative of the relief it seeks in the Petition. Thus, the Petition presents no compelling issue for the Court and is a waste of the Court's time and resources. For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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RECORD AND BRIEFS.

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REPUBLIC OF SUDAN,

Petitioner,

v.

RICK HARRISON, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONER

Respondents are mistaken both in disputing the suitability of this case as a vehicle to decide the question presented and in contesting the existence of a genuine circuit split.

First, Respondents incorrectly suggest that the D.C. District Court — which issued the underlying default judgment — may yet invalidate the service of process in this matter. Under fundamental principles of issue preclusion, the Second Circuit's decision precludes the D.C. District Court from following the conflicting precedent of the D.C. Circuit. The D.C. District Court's predicament — being obligated to apply law at odds with its own Circuit law — dramatically underscores the urgent need for this Court's review.

Second, Respondents can deny the existence of a circuit split only by embracing a facile and unsustainable distinction between service "on" an embassy and service on the foreign state "via," "through," or "in care of" an embassy. In fact, Respondents acknowledge that, but for this semantic ploy, the Second Circuit ruling would be directly at odds with the D.C., Fifth, and Seventh Circuits.

Sudan has demonstrated that the Second Circuit's decision is inconsistent with the plain language of § 1608(a)(3), various decisions by other circuits, relevant legislative history, and binding U.S. treaty obligations under the Vienna Convention on Diplomatic Relations. While Respondents colorfully characterize Sudan's showing as "utterly contrived" (Opp'n 1) and a "sham" (Opp'n 5), Sudan's position is

shared by the United States in a series of briefs including one (App. 148a) postdating the Second Circuit decisions under review, and by at least four foreign sovereigns, each of which have expressed their support for certiorari in this case.

All told, Sudan's Petition is a sound vehicle for addressing a bona fide circuit split on a question of statutory construction that impacts issues of national and international importance.

I. Sudan's Pending Motion To Vacate Only Underscores The Urgent Need For This Court's Review

Respondents err in suggesting that Sudan's motion, in the D.C. District Court, to vacate the underlying default judgment renders the Petition "a needless waste of the Court's time and resources." Opp'n 2. Because the Second Circuit has already ruled on the validity of service of process underlying this case, the D.C. District Court is (regrettably) precluded from finding to the contrary in an action involving the same parties and addressing the same service of process. *See* Restatement (Second) of Judgments § 27 (Am. Law Inst. 1982) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 162 F.3d 724, 731 (2d Cir. 1998) (reversing default judgment because D.C. Circuit decision in parallel enforcement proceedings found initial service of process invalid and decision had preclusive effect

in defendant's attack on the judgment). Such issue preclusion is effective even though the Second Circuit ruling is incorrect and contrary to D.C. Circuit law. *See B&B Hardware, Inc. v. Hargis Indus.*, 135 S. Ct. 1293, 1308 ("[I]ssue preclusion prevents relitigation of wrong decisions just as much as right ones."). Only if this Court grants certiorari and reverses (or vacates) may the D.C. District Court vacate the default judgment for improper service of process.

In a contrived argument against certiorari, Respondents state that the D.C. District Court, rather than this Court, should consider Sudan's arguments. Opp'n 2. But Respondents themselves took the opposite position below: Prior to the Second Circuit issuing any decision, Sudan — seeking to avoid issue preclusion — moved the Second Circuit to hold its decision in abeyance — over Respondents' objection. *See* Motion to Hold the Court's Decision in Abeyance, *Harrison v. Republic of Sudan*, No. 14-121 (2d Cir. July 2, 2015), ECF No. 76. The Second Circuit denied Sudan's motion and issued its ruling. *See* App. 5a n.2. Thus, not only is the D.C. District Court now precluded from reviewing Sudan's service arguments, but Respondents had a hand in denying the D.C. District Court that review. Respondents now cynically urge this Court to defer to the D.C. District Court, which is powerless to entertain Sudan's service arguments.

The D.C. District Court — presumably awaiting resolution of this Petition — is currently required to apply an erroneous Second Circuit decision that directly conflicts with the law of the D.C. Circuit. *See*

Barot v. Embassy of the Republic of Zambia, 785 F.3d 26, 30 (D.C. Cir. 2015) (after improper attempt at service on Zambian Embassy, directing § 1608(a)(3) service on Zambia be addressed and dispatched "'to the head of the ministry of foreign affairs' *in Lusaka, Zambia*" (emphasis added)). Had the D.C. District Court decided Sudan's vacatur motion *before* the Second Circuit ruled, the D.C. District Court undoubtedly would have held Respondents' service "on," "via," or "in care of" Sudan's Embassy invalid under *Barot*. This untenable split of authority — providing conflicting outcomes under the law of different circuits — is precisely why this Court should grant certiorari here.

Contrary to Respondents' suggestion (Opp'n 3), no "evidentiary issues" are relevant to this Court's review of the discrete and purely legal question presented in the Petition, namely whether service on Sudan under § 1608(a)(3) "via" the Embassy was valid. The only facts relevant to this Court's review are undisputed: Respondents attempted service on Sudan by mailing the service package to the Sudanese Embassy in Washington, D.C., not to the Ministry of Foreign Affairs in Khartoum.

II. The Circuit Conflict Is Bona Fide And Impacts Issues Of National And International Importance

To avoid conceding the existence of a conflict with the D.C., Fifth, and Seventh Circuits, Respondents (like the Second Circuit Panel) rely upon a semantic sleight of hand — an artificial distinction between service "on" an embassy and service "via," "through," or "in care of" an embassy. Opp'n 5-14. In fact, Respondents admit that this artificial distinction is

all that separates the Panel Opinion from the D.C., Fifth, and Seventh Circuits (*see* Opp'n 10 (admitting the cases "stand for . . . the basic principle that service on a foreign state . . . cannot be accomplished, under 28 U.S.C. § 1608(a)(3), by directly serving the foreign state's embassy")), and Respondents flatly concede that the Vienna Convention "prohibits service on an embassy" (Opp'n 17 (heading)).

For a number of reasons, the distinction between service "on" and "via" an embassy is meaningless.

1. The natural reading of § 1608(a)(3) does not support a distinction between service "on" and "via" an embassy. The statute requires that process be "addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs." 28 U.S.C. § 1608(a)(3). As the United States has repeatedly emphasized in this case and elsewhere:

> The most natural understanding of [§ 1608(a)(3)] is that the mail will be sent to the head of the ministry of foreign affairs at his or her regular place of work — *i.e.*, at the ministry of foreign affairs in the state's seat of government — not to some other location for forwarding.

App. 141a; *see also* App. 160a-161a.

In their Opposition, Respondents do not address even once the position of the United States. And, though Respondents charge that Sudan's position would require the Court to "rewrite" § 1608(a)(3) to provide that process be dispatched "directly" to the

head of the ministry (Opp'n 18), in fact Respondents' position would insert into the statute the unwritten option of dispatching process "indirectly" to an intermediary, on the assumption those papers will be forwarded to the head of the ministry.

Respondents contrast §§ 1608(a)(3) and (a)(4), suggesting that Congress could have specified in (a)(3) the geographic destination for transmitting service, as it did in (a)(4) directing service "to the Secretary of State in Washington, D.C." Opp'n 18. But, as Sudan already explained (Pet. 20), the clarification was necessary in § 1608(a)(4), but not in § 1608(a)(3), because the United States has secretaries of state in each of the 50 states and the District of Columbia, while each foreign sovereign generally has only one head of the ministry of foreign affairs, usually located in the foreign state's capital city.

Moreover, as the United States has pointed out in rejecting Respondents' argument (App. 142a), a separate contrast in the statute undermines that argument. Specifically, though Congress authorized service via an agent for service on a foreign agency or instrumentality (§ 1608(b)(2)), Congress omitted any reference to an officer or agent for service on the state itself under § 1608(a).

In any event, to the extent the statute is ambiguous, the legislative history makes clear that Congress intended the FSIA service provisions to respect U.S. obligations under the Vienna Convention. Pet. 23-24. Further, if a possible statutory construction exists that avoids creating a violation of U.S. treaty obligations, as is the case

here, then it must be adopted. Restatement (Third) of the Foreign Relations Law of the United States § 114 (Am. Law Inst. 1986) ("Where fairly possible, a United States statute is to be construed so as not to conflict with . . . an international agreement of the United States."); *Roeder v. Islamic Republic of Iran*, 646 F.3d 56, 61 (D.C. Cir. 2011) ("An ambiguous statute cannot supercede an international agreement if an alternative reading is fairly possible.").

2. Service "on," "via," "through," and "in care of" an embassy are all equally violations of the Vienna Convention's protection of mission inviolability, because they each require nonconsensual entry into the mission premises and the embassy to act as an agent for receiving service. *See* Vienna Convention, art. 22(1).

This view of the Convention is hardly a "strawman" or "sham" argument (Opp'n 5), but rather is supported by the United States (App. 143a-144a, 162a-166a), and by other treaty parties that have expressed strong interests in obtaining this Court's review (*see generally* Briefs of *Amici Curiae* United Arab Emirates, Kingdom of Saudi Arabia, Government of National Accord of State of Libya (Apr. 10, 2017); Supp. Br. App. (Austrian Embassy Note Verbale)).

Before the Second Circuit, the United States asserted:

> The intrusion on a foreign embassy is present whether it is the ultimate recipient or merely the conduit of a summons and complaint.

App. 144a.

Here, the United Arab Emirates similarly asserts:

> [T]he panel's analysis assumes it is permissible and appropriate for Congress to commandeer an embassy's internal and protected processes for communicating with its home country . . . [It] offends all of the[] protections [afforded by Articles 22, 27, 29, 31, and 34 of the VCDR, and] . . . mandates the ambassador to play the role of receiving agent for the foreign minister.

United Arab Emirates Br. 7. The Republic of Austria emphasizes:

> Article 22 of the [VCDR] establishes that neither judicial nor administrative acts of public authority by the receiving state are to be exercised on the premises of the diplomatic mission. This includes service of foreign legal documents, both directed at the diplomatic mission itself or at the respective foreign state.

Austrian Embassy Note Verbale ¶ 6. The Kingdom of Saudi Arabia states:

> The notion that an American court can dictate the contents of a diplomatic

> pouch for *mere convenience* of a litigant is repugnant to basic norms of international law.

Saudi Arabia Br. 10 (emphasis in original).

Moreover, as Libya states, the Second Circuit's decision expects too much of the personnel receiving embassy packages, namely to understand the package's contents and whether to accept or reject them:

> [D]eveloping and transitional nations cannot afford the substantial risks of leaving service of process — and, by extension, the specter of default judgment — in the hands of often-transitory embassy staff who lack any delegated authority over legal matters from their home government. And, pursuant to the diplomatic inviolability guaranteed by treaty under Article 22 of the VCDR, they should not have to.

Libya Br. 4. (Here, Respondents baselessly assert that diplomatic "officials" signed for the service package. Opp'n 5-6.) The United States agrees that embassy staff signing for packages are not consenting within the meaning of Article 22. App. 169a n.2.

These views of the Executive Branch and the treaty parties are entitled, respectively, to "great" and "considerable weight." *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1512 (2017). They also are supported by legal scholarship (Pet. 22) and

customary international law (Brief of *Amici Curiae* International Law Professors 12-13 (Apr. 10, 2017)).

Respondents, again, do not expressly address the views of the United States, presumably in the hopes that those views will be overlooked. And, despite requesting additional time to file their Opposition on account of the four amicus briefs filed in support of the Petition, Respondents do not address or rebut a single one.

3. Respondents' meaningless distinction between service "on" and "via" the embassy lacks practical legitimacy as well. The two district court decisions allowing service "via" a defendant's embassy (*Rux* and *Wye Oak*) treat such service, for all practical purposes, no differently than if the service had been service "on" the embassy.

Similarly, here, neither Plaintiffs in the D.C. District Court nor the clerk of the court recognized any such a distinction. The service package was not accompanied by any unique instruction to the Sudanese Embassy to employ its diplomatic pouch to forward the service papers to the head of its Ministry of Foreign Affairs. Plaintiffs also submitted the same proof of service pursuant to 28 U.S.C. § 1608(c)(2) as they would have for service *on* the embassy (a mailing receipt of purported delivery *to the Embassy*), and the 60-day period for Sudan to respond to the complaint (*see id.* § 1608(d)) apparently began running on the date of purported service *on the Embassy* — not some later date of delivery to account for the weeks or months it might take to transmit service by diplomatic pouch to the head of the Ministry of Foreign Affairs in Khartoum.

Respondents' single attempt to identify a practical difference between service "on" and "via" (Opp'n 6) rings hollow. Respondents cite no authority for the outlandish proposition that service "on" an embassy is perfected the moment it is delivered to the embassy without regard to whether it is "accepted." The Vienna Convention unquestionably bars such service altogether. Art. 22(1) (expressly requiring "consent of the head of the mission"); *see also* U.S. Br., *Kumar*, 19 n.2 (App. 169a) ("When staff at United States embassies around the world sign for or accept delivery of packages, the United States does not consider that to amount to consent within the meaning of Article 22."). And merely because examples exist in the case law showing that staff at the Sudanese Embassy rejected service in some instances does not, as Respondents contend (Opp'n 7), translate to a rule that service mailed "via" (or to) an embassy is perfected unless it is rejected.

4. Respondents acknowledge that numerous courts have prohibited service on or through an embassy, mission, or ambassador. *See* Opp'n 10 (citing, *inter alia*, *Barot* and *Magness*). These decisions directly conflict with the Second Circuit but for the artificial distinction between service "on" and "via" the embassy. Yet, even accepting the wordplay as meaningful (which it is not), the Panel Opinion still conflicts with the D.C. and Fifth Circuits.

In *Barot*, the D.C. Circuit makes clear — twice — that proper service entails mailing the service papers to the minister *at the ministry in the foreign country*. 785 F.3d at 28, 30. The court also states that its rationale for requiring service be sent to the ministry,

rather than the embassy, is that "the Ministry is the agency most likely to understand U.S. judicial procedure." *Id.* at 28. The court even credited a prior service attempt for at least being sent to the P.O. Box address of the ministry in Lusaka, Zambia, though the mailing suffered from other defects. *Id.* Respondents are incorrect in suggesting that the *Barot* court would condone mailing service to an embassy so long as the package was addressed to the head of the Ministry of Foreign Affairs (Opp'n 10-11), given the *Barot* court's repeated insistence that service be sent to Lusaka, Zambia in strict compliance with § 1608(a)(3).

Respondents also overlook the factual similarities (and disparate results) of the Fifth Circuit's decision in *Magness*. *See* Opp'n 12. In *Magness*, the Fifth Circuit explicitly rejected the possibility of service transmitted to the proper authorities "care of" other Russian agencies. 247 F.3d 609, 611 (5th Cir. 2001). Respondents offer no explanation why service "via" or "care of" an embassy would be proper under § 1608(a)(3), but "via" a different foreign agency would not.

III. The Second Circuit Decision Is Erroneous

As the Petition shows, the Panel Opinion is inconsistent with both the plain meaning of § 1608(a)(3) and its legislative history. The decision places the United States in violation of its international obligations and compromises U.S. interests abroad — another issue Respondents completely ignore. The United States and already four of its treaty partners support Sudan's position.

By contrast, the only support Respondents cite for upholding the Panel Opinion are two prior district court cases from the same court, *Rux* and *Wye Oak*, where one case relies on the other. Opp'n 15-16. These erroneous decisions also fail to meaningfully distinguish service "on" and "via" an embassy.

Contrary to Respondents' argument (Opp'n 19), congressional acquiescence cannot be gleaned from the absence of amendments to § 1608(a)(3) in the years after *Rux* when Congress amended the "terrorism exception" to sovereign immunity (28 U.S.C. § 1605A). Service under § 1608(a)(3) is broadly applicable to all FSIA cases and has no particular bearing on terrorism exception cases. Moreover, the issue of service "via" an embassy had not, at that time, received the attention from the United States and the diplomatic and international communities that it now has. This Court need not wait for Congress to act; the statute is clear and this Court should grant certiorari to bring the Second Circuit in line with its sister circuits.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Court should grant certiorari.

Respectfully submitted,

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No. 16-1094

In the Supreme Court of the United States

REPUBLIC OF SUDAN, PETITIONER

v.

RICK HARRISON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, provides four exclusive, hierarchical means for a litigant to serve a foreign state in the courts of the United States. 28 U.S.C. 1608(a)(1)-(4). The third means, in Section 1608(a)(3), provides for "a copy of the summons and complaint and a notice of suit * * * to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. 1608(a)(3).

The question presented is whether service under Section 1608(a)(3) may be accomplished by requesting the clerk to mail the service package, if the papers are directed to the minister of foreign affairs, to the embassy of the foreign state in the United States, or whether Section 1608(a)(3) requires that process be mailed to the ministry of foreign affairs in the country concerned.

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In the Supreme Court of the United States

No. 16-1094

REPUBLIC OF SUDAN, PETITIONER

v.

RICK HARRISON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be held pending the Court's disposition of the petition for a writ of certiorari in *Kumar* v. *Republic of Sudan*, No. 17-1269 (filed Mar. 9, 2018), and then be disposed of as appropriate. In the alternative, if the Court grants the petition in *Kumar*, the Court may wish to grant certiorari in this case and consolidate it with *Kumar* for consideration of the merits.

STATEMENT

1. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, provides the sole basis for civil suits against foreign states and their agencies or instrumentalities in United States

courts. See, *e.g.*, *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-435 & n.3 (1989). The FSIA establishes that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided" by the Act. 28 U.S.C. 1604. If a suit comes within a statutory exception to foreign sovereign immunity, the FSIA provides for subject-matter jurisdiction in district courts, 28 U.S.C. 1330(a), as well as for personal jurisdiction over the foreign state "where service has been made under section 1608." 28 U.S.C. 1330(b).

Section 1608(a) provides the exclusive means for serving "a foreign state or political subdivision of a foreign state" in civil litigation. 28 U.S.C. 1608(a); see Fed. R. Civ. P. 4(j)(1). The provision specifies four exclusive methods of service, in hierarchical order. See, *e.g.*, Pet. App. 8a; *Magness* v. *Russian Fed'n*, 247 F.3d 609, 613 (5th Cir.), cert. denied, 534 U.S. 892 (2001). First, service must be effected on a foreign state "in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision." 28 U.S.C. 1608(a)(1). Second, if no such special arrangement exists, service must be provided "in accordance with an applicable international convention on service of judicial documents." 28 U.S.C. 1608(a)(2). Third, if no such international convention applies, service shall be made

> by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.

28 U.S.C. 1608(a)(3). Fourth, if service cannot be made within thirty days under Section 1608(a)(3), the litigant must deliver process to the State Department for service "through diplomatic channels to the foreign state." 28 U.S.C. 1608(a)(4).

2. On October 12, 2000, terrorists bombed the USS *Cole* in the Port of Aden, Yemen. Pet. App. 24a. Seventeen U.S. service members were killed and forty-two others were injured. *Ibid.* In 2010, the individual respondents, who are sailors and spouses of sailors injured in the bombing, sued petitioner, the Republic of Sudan, in the District Court for the District of Columbia. Pet. 8. Relying on the cause of action set forth in 28 U.S.C. 1605A, which is available in actions against designated state sponsors of terrorism such as the Republic of Sudan, respondents alleged that petitioner provided material support to the al Qaeda operatives who carried out the bombing. Pet. 8; Pet. App. 3a.

Because service under 28 U.S.C. 1608(a)(1)-(2) was not possible, respondents attempted to serve petitioner under Section 1608(a)(3). Pet. App. 4a, 9a. They requested that the Clerk of Court mail a copy of the summons and complaint via registered mail, return receipt requested, to:

> Republic of Sudan
> Deng Alor Koul
> Minister of Foreign Affairs
> Embassy of the Republic of Sudan
> 2210 Massachusetts Avenue NW
> Washington, DC 20008

Id. at 132a.

Petitioner did not respond within sixty days, see 28 U.S.C. 1608(d), and following a hearing, the district court entered a default judgment against petitioner.

Pet. App. 22a-23a. The court determined that service on petitioner was proper, *id.* at 27a-28a, and that it had jurisdiction under 28 U.S.C. 1605A(a). Pet. App. 29a-64a. The court then concluded that respondents had established petitioner's liability under 28 U.S.C. 1605A and 1606, and awarded respondents $314.7 million in damages. Pet. App. 22a-23a, 64a-75a. Respondents attempted to serve the default judgment on petitioner by the same delivery method—through the clerk's mailing of the papers to the Embassy of the Republic of Sudan in Washington, D.C. *Id.* at 5a; see 28 U.S.C. 1608(e) (requiring service of any default judgment).

3. Respondents registered the default judgment in the District Court for the Southern District of New York. Pet. App. 5a. Both that court and the District Court for the District of Columbia determined that respondents had effected service of the default judgment and that respondents could seek attachment and execution of the judgment. *Id.* at 6a; see 28 U.S.C. 1610(c).

Respondents filed three petitions in the Southern District of New York seeking turnover of assets of petitioner's agencies and instrumentalities held by respondent banks Mashreqbank PSC, BNP Paribas, and Credit Agricole Corporate and Investment Bank—assets which had been frozen pursuant to the Sudanese Sanctions Regulations, 31 C.F.R. Part 538. Pet. App. 6a; see Fed. R. Civ. P. 69(a). Respondents again attempted to serve the relevant papers on Sudan by mailing them to the Embassy of the Republic of Sudan in Washington, D.C., in a package directed to the Minister of Foreign Affairs. Pet. App. 6a. The district court granted respondents' petitions and issued three turnover orders against the banks in partial satisfaction of the default judgment. *Id.* at 76a-91a.

Petitioner then entered an appearance in the Southern District of New York and timely appealed the issuance of the turnover orders. Pet. App. 6a-7a.*

4. The court of appeals affirmed. Pet. App. 1a-21a. It concluded that respondents had properly effected service under Section 1608(a)(3) in the original action. *Id.* at 8a-15a. The court held that service under Section 1608(a)(3), which requires that process be "addressed and dispatched * * * to the head of the ministry of foreign affairs of the foreign state concerned," 28 U.S.C. 1608(a)(3), could be accomplished by providing for delivery to the "minister of foreign affairs via an embassy address." Pet. App. 11a. According to the court, Section 1608(a)(3) did not require that service be made on the Minister of Foreign Affairs of Sudan at the Ministry of Foreign Affairs in Khartoum, Sudan, because the statute does not expressly state that process must "be mailed to a location in the foreign state," and respondents' method of service "could reasonably be expected to result in delivery to the intended person." *Ibid.*

The court of appeals recognized that the FSIA's legislative history "seemed to contemplate—and reject—service on an embassy," in order to "prevent any inconsistency with the Vienna Convention on Diplomatic Relations," which provides that "'[t]he premises of the [diplomatic] mission shall be inviolable.'" Pet. App. 13a-14a (citation omitted; brackets in original). But the court distinguished "'service *on* an embassy'" from "service on a minister of foreign affairs *via* or *care of* an

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* While that appeal was pending, petitioner entered an appearance in the litigation in the District Court for the District of Columbia and moved to vacate the default judgment under Federal Rule of Civil Procedure 60(b). The district court has not ruled on that motion. Pet. App. 96a n.1.

embassy," which the court held was permissible and did not implicate "principles of mission inviolability and diplomatic immunity." *Ibid.* (brackets and citation omitted). Having concluded that respondents' initial service was proper, the court determined that service of the default judgment and all post-judgment motions was proper as well. *Id.* at 15a.

5. Following additional briefing and argument in which the United States participated, see Pet. App. 135a-147a, the court of appeals denied petitioner's motion for panel rehearing. *Id.* at 97a. Although "acknowledg[ing]" that the issue "presents a close call," *ibid.*, the court adhered to its prior conclusion that Section 1608(a)(3) permitted respondents to serve petitioner by a "mailing addressed to the minister of foreign affairs via Sudan's embassy in Washington, D.C.," *id.* at 98a, because the statute "does not specify that the mailing be sent to the head of the ministry of foreign affairs *in* the foreign country," *id.* at 99a. The court reiterated its view that respondents' method of service "could reasonably be expected to result in delivery to the intended person." *Id.* at 98a. And it again stated that although Section 1608(a)(3) does not permit service "'*on*'" an embassy, "[t]he legislative history does not address * * * whether Congress intended to permit the mailing of service to a foreign minister via an embassy." *Id.* at 102a (citation omitted). For that reason, the court rejected, "with some reluctance," the United States' argument that the court's interpretation of Section 1608(a)(3) contravenes the Vienna Convention on Diplomatic Relations (VCDR), *done* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. Pet. App. 109a; see *id.* at 105a-109a. In the court's view, "service on an embassy or consular official would be improper" under the VCDR,

but service with papers "addressed to the Minister of Foreign Affairs via the embassy" conforms to the Convention's requirements. *Id.* at 106a. And while the United States had noted that it "consistently rejects attempted service via direct delivery to a U.S. embassy abroad" because it believes such service to be inconsistent with international law, the court stated that its rule would "not preclude the United States (or any other country) from enforcing a policy of refusing to accept service via its embassies." *Ibid.* (citation omitted). Finally, the court opined that "the Sudanese Embassy's acceptance of the service package surely constituted 'consent'" for purposes of the VCDR. *Id.* at 107.

The court of appeals denied rehearing en banc. Pet. App. 114a-115a.

DISCUSSION

The United States deeply sympathizes with the extraordinary injuries suffered by respondents, and it condemns in the strongest possible terms the terrorist acts that caused those injuries. The United States also has a strong interest in opposing and deterring state sponsored terrorism and supporting appropriate recoveries for U.S. victims.

Nevertheless, as the United States has long maintained, the court of appeals erred by holding that the FSIA, 28 U.S.C. 1608(a)(3), permits service on a foreign state "via" or in "care of" the foreign state's diplomatic mission in the United States. Pet. App. 13a. That decision contravenes the most natural reading of the statutory text, treaty obligations, and the FSIA's legislative history, and it threatens harm to the United States' foreign relations and its treatment in courts abroad. The decision below also squarely conflicts with a recent de-

cision of the Fourth Circuit, *Kumar* v. *Republic of Sudan*, 880 F.3d 144, 158 (2018), petition for cert. pending, No. 17-1269 (filed Mar. 9, 2018), and is in significant tension with decisions of the Seventh and D.C. Circuits. As the parties in both this case and *Kumar* now recognize, the question presented warrants this Court's review. See Resps. Supp. Br. 1-2; Resp. to Pet. at 1-2, *Kumar*, *supra* (No. 17-1269).

This case, however, has potential vehicle problems that could complicate the Court's consideration. Because *Kumar* appears to present a more suitable vehicle for addressing the question presented, the petition for a writ of certiorari in this case should be held pending the Court's consideration of the petition in *Kumar*, and then disposed of as appropriate. In the alternative, this Court may wish to grant certiorari in both cases and consolidate them for review.

A. The Foreign Sovereign Immunities Act Does Not Permit A Litigant To Serve A Foreign State By Requesting That Process Directed To The Foreign Minister Be Mailed To The State's Embassy In The United States

The FSIA's text, the United States' treaty obligations, and the statute's legislative history all demonstrate that Section 1608(a)(3) does not permit a litigant to serve a foreign state by requesting that process directed to the state's minister of foreign affairs be mailed to the state's embassy in the United States.

1. a. Section 1608(a) provides four exclusive, hierarchical means for serving "a foreign state or political subdivision of a foreign state" in civil litigation. 28 U.S.C. 1608(a). The provision at issue here, Section 1608(a)(3), permits a litigant to serve a foreign state "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the

head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. 1608(a)(3).

Although Section 1608(a)(3) does not expressly identify the location of service, the most natural understanding of the text is that it requires delivery to the ministry of foreign affairs at the foreign state's seat of government. The statute mandates that service be "addressed and dispatched * * * to the head of the ministry of foreign affairs." 28 U.S.C. 1608(a)(3). It is logical to conclude that delivery should be made to that official's principal place of business, *i.e.*, the ministry of foreign affairs in the foreign state's seat of government. See *Kumar*, 880 F.3d at 155 (Section 1608(a)(3) "reinforce[s] that the location must be related to the intended recipient."). A state's foreign minister does not work in the state's embassies throughout the world, and nothing in the statute suggests that Congress expected foreign ministers to be served at locations removed from their principal place of performance of their official duties. See *ibid.*

If Congress had intended to permit service "via" a foreign embassy in the United States, *e.g.*, Pet. App. 101a, it would have provided that service be addressed to the foreign state's ambassador, or to an agent, rather than "addressed and dispatched * * * to the head of the ministry of foreign affairs." 28 U.S.C. 1608(a)(3). Indeed, the neighboring provision, Section 1608(b), which governs service on a foreign state agency or instrumentality, expressly provides for service by "delivery * * * to an officer, a managing or general agent, or to any other [authorized] agent." 28 U.S.C. 1608(b)(2). Congress's failure to include similar language in Section 1608(a) underscores that it did not envision that service

would be sent to a foreign state's embassy, with embassy personnel effectively functioning as agents for forwarding service to the head of the ministry of foreign affairs. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets and citation omitted).

b. The court of appeals drew different inferences from the statutory text. It noted that in contrast to Section 1608(a)(3), Section 1608(a)(4) specifies that papers may be mailed "to the Secretary of State *in Washington, District of Columbia.*" Pet. App. 99a. As the Fourth Circuit explained, however, reliance on Section 1608(a)(4) is unpersuasive: Unlike Section 1608(a)(3), Section 1608(a)(4) "directs attention to one known location for one country—the United States—and so can be easily identified." *Kumar*, 880 F.3d at 159.

The court of appeals also was of the view that "[a] mailing addressed to the minister of foreign affairs via Sudan's embassy in Washington, D.C. * * * could reasonably be expected to result in delivery to the intended person." Pet. App. 98a. But Section 1608(a)'s exclusive methods of service require "strict compliance." *Kumar*, 880 F.3d at 154; *Magness* v. *Russian Fed'n*, 247 F.3d 609, 615 (5th Cir.), cert. denied, 534 U.S. 892 (2001); *Transaero, Inc.* v. *La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994), cert. denied, 513 U.S. 1150 (1995). But see *Peterson* v. *Islamic Republic Of Iran*, 627 F.3d 1117, 1129 (9th Cir. 2010) (upholding defective service based on substantial compliance with Section 1608(a)). By contrast, where Congress envisioned an actual-notice standard, it said so expressly: Section

1608(b) contains a "catchall * * * expressly allowing service by any method 'reasonably calculated to give actual notice.'" *Kumar*, 880 F.3d at 154 (quoting 28 U.S.C. 1608(b)(3)); see also, *e.g.*, *Transaero*, 30 F.3d at 154.

2. The United States' treaty obligations further demonstrate that Section 1608(a)(3) does not permit a litigant to serve a foreign state by having process mailed to the foreign state's embassy in the United States.

a. The VCDR, which the United States signed in 1961 and ratified in 1972, and which "codified longstanding principles of customary international law with respect to diplomatic relations," *767 Third Ave. Assocs.* v. *Permanent Mission of The Republic of Zaire to the United Nations*, 988 F.2d 295, 300 (2d Cir.), cert. denied, 510 U.S. 819 (1993), establishes certain obligations of the United States with respect to foreign diplomats and diplomatic premises in this country. See *Boos* v. *Barry*, 485 U.S. 312, 322 (1988). Article 22, Section 1 of the VCDR provides that "[t]he premises of" a foreign state's "mission shall be inviolable," and "[t]he agents of the receiving State may not enter them, except with the consent of the head of the mission." VCDR, art. 22, sec. 1, 23 U.S.T. 3237, 500 U.N.T.S. 106. Mission inviolability means, among other things, that "the receiving State * * * is under a duty to abstain from exercising any sovereign rights, in particular law enforcement rights, in respect of inviolable premises." Eileen Denza, *Diplomatic Law* 110 (4th ed. 2016) (Denza).

Section 1608(a)(3) should be interpreted in a manner that is consistent with the United States' treaty obligations. See, *e.g.*, *Cook* v. *United States*, 288 U.S. 102, 120 (1933); 1 Restatement (Third) of the Foreign Relations Law of the United States § 114 (1987) ("Where fairly

possible, a United States statute is to be construed so as not to conflict * * * with an international agreement of the United States."). Construing Section 1608(a)(3) to require that process be mailed to the ministry of foreign affairs in the foreign state ensures that the inviolability of foreign embassies within the United States is maintained.

By contrast, the court of appeals' determination that a litigant may serve a foreign state by directing process to be mailed to the foreign state's embassy in the United States is inconsistent with the inviolability of mission premises recognized by the VCDR. The Executive Branch has long interpreted Article 22 and the customary international law it codifies to preclude a litigant from serving a foreign state with process by mail or personal delivery to the state's embassy. See *Hellenic Lines, Ltd.* v. *Moore*, 345 F.2d 978, 982 (D.C. Cir. 1965) (Washington, J., concurring) ("The establishment by one country of a diplomatic mission in the territory of another does not * * * empower that mission to act as agent of the sending state for the purpose of accepting service of process.") (quoting Letter from Leonard C. Meeker, Acting Legal Adviser, U.S. Dep't of State, to John W. Douglas, Assistant Att'y Gen., U.S. Dep't of Justice (Aug. 10, 1964)). This interpretation of the VCDR "is entitled to great weight," *Abbott* v. *Abbott*, 560 U.S. 1, 15 (2010) (citation omitted), in light of "the Constitution's grant to the Executive Branch * * * of broad oversight over foreign affairs," *Kumar*, 880 F.3d at 157. See *id.* at 158 (the Executive Branch's "long-standing policy and interpretation" of Article 22 is "authoritative, reasoned, and entitled to great weight").

The Executive Branch's interpretation also reflects the prevailing understanding of Article 22. As a leading

treatise explains, it is "generally accepted" that "service by post on mission premises is prohibited." Denza 124. Other treatises are in accord. See James Crawford, *Brownlie's Principles of Public International Law* 403 (8th ed. 2012) ("It follows from Article 22 that writs cannot be served, even by post, within the premises of a mission but only through the Ministry for Foreign Affairs."); Ludwik Dembinski, *The Modern Law of Diplomacy* 193 (1988) (Article 22 "protects the mission from receiving by messenger or by mail any notification from the judicial or other authorities of the receiving State."). Other countries also share this understanding. See, *e.g.*, Pet. Supp. Br. App. 2a (Note Verbale from the Republic of Austria to the State Department); Kingdom of Saudi Arabia Amicus Br. 12-14. And domestically, the Fourth and Seventh Circuits have recognized that attempting to serve a party in a foreign country "through an embassy [in the United States] is expressly banned * * * by [the VCDR]." *Autotech Techs. LP* v. *Integral Research & Dev. Corp.*, 499 F.3d 737, 748 (7th Cir. 2007), cert. denied, 552 U.S. 1231 (2008); see *Kumar*, 880 F.3d at 157.

The Convention's drafting history is to the same effect. See *Water Splash, Inc.* v. *Menon*, 137 S. Ct. 1504, 1511 (2017) (considering treaty drafting history); *Medellin* v. *Texas*, 552 U.S. 491, 507-508 (2008) (same). In a report accompanying a preliminary draft of the VCDR, the United Nations International Law Commission explained:

> [N]o writ shall be served within the premises of the mission, nor shall any summons to appear before a court be served in the premises by a process server. Even if process servers do not enter the premises but carry out their duty at the door, such an act

> would constitute an infringement of the respect due to the mission. All judicial notices of this nature must be delivered through the Ministry for Foreign Affairs of the receiving State.

U.N. Int'l L. Comm'n, *Report of the Commission to the General Assembly, Doc. A/3623*, 2 Y.B. Int'l L. Comm'n 131, 137 (1957).

b. In light of this prevailing understanding, this Office is informed that the United States routinely refuses to recognize the propriety of service through mail or personal delivery by a private party or foreign court to a United States embassy. When a foreign litigant or court officer purports to serve the United States through an embassy, the embassy sends a diplomatic note to the foreign ministry in the forum state, explaining that the United States does not consider itself to have been served consistent with international law and thus will not appear in the litigation or honor any judgment that may be entered against it. See 2 U.S. Dep't of State, *Foreign Affairs Manual* § 284.3(c) (2013). The United States has a strong interest in ensuring that its courts afford foreign states the same treatment to which the United States believes it is entitled under customary international law and the VCDR. See, *e.g.*, *Kumar*, 880 F.3d at 158 (recognizing importance of reciprocity interest); *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984) (United States' interest in reciprocal treatment "throw[s] light on congressional intent").

c. Although the court of appeals acknowledged that the Executive Branch's treaty interpretation "is to be afforded 'great weight,' it summarily rejected [the government's] position." *Kumar*, 880 F.3d at 159 n.11 (ci-

tation omitted); see Pet. App. 109a. The court acknowledged that "service on an embassy or consular official would be improper" under the VCDR, Pet. App. 106a, but it believed "[t]here is a significant difference between *serving process* on an embassy, and mailing papers to a country's foreign ministry *via* the embassy," *id.* at 101a; see *id.* at 14a. But as the Fourth Circuit stated, that is an "artificial" and "non-textual" distinction. *Kumar*, 880 F.3d at 159 n.11; see *id.* at 157 (distinction arises from "meaningless semantic[s]"). In either case, the suit is against the foreign state. See 28 U.S.C. 1603(a); *El-Hadad* v. *United Arab Emirates*, 216 F.3d 29, 31-32 (D.C. Cir. 2000) (treating suit against foreign embassy as suit against the state); *Gray* v. *Permanent Mission of the People's Republic of the Congo to the United Nations*, 443 F. Supp. 816, 820 (S.D.N.Y.) (holding that permanent mission of foreign country to the United Nations is a "foreign state" under the FSIA), aff'd, 580 F.3d 1044 (2d Cir. 1978). And in either case, mailing service to the embassy treats it as the state's "de facto agent for service of process," in violation of the VCDR's principle of mission inviolability. *Kumar*, 880 F.3d at 159 n.11.

The court below also suggested that service "via" petitioner's embassy complied with the VCDR because the embassy consented to service by "accept[ing]" the papers. Pet. App. 107a. But the VCDR provides that "agents of [a] receiving State may not enter [a mission], *except with the consent of the head of the mission*." Art. 22, sec. 1, 23 U.S.T. 3237, 500 U.N.T.S. 106 (emphasis added). "Simple acceptance of the certified mailing from the clerk of court [by an embassy employee] does not demonstrate a waiver [of the VCDR]." *Kumar*, 880 F.3d at 157 n.9. And no record evidence suggests that

petitioner's Ambassador to the United States—the head of the mission—was aware of, much less consented to receive, respondents' service of process.

3. The FSIA's legislative history confirms that Congress intended the statute to bar service by mail to a foreign state's embassy.

a. An early draft of the FSIA permitted service on a foreign state by "registered or certified mail * * * to the ambassador or chief of mission of the foreign state" in the United States. S. 566, Sec. 1(1) [§ 1608], 93d Cong., 1st Sess. (1973). The State Department recommended removing that method based on its view that it would violate Article 22 of the VCDR. See H.R. Rep. No. 1487, 94th Cong., 2d Sess. 26 (1976) (House Report); *Service of Legal Process by Mail on Foreign Governments in the U.S.*, 71 Dep't St. Bull., No. 1840, at 458, 458-459 (Sept. 30, 1974). A subsequent version of the bill eliminated that method of service. H.R. 11315, Sec. 4(a) [§ 1608], 94th Cong., 1st Sess. (1975).

In addition, the House Report accompanying the bill that became the FSIA explained that some litigants had previously attempted to serve foreign states by "mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state." House Report 26. The Report described this practice as having "questionable validity" and stated that "Section 1608 precludes this method so as to avoid questions of inconsistency with section 1 of article 22 of the [VCDR]." *Ibid.* Thus, "[s]ervice on an embassy by mail would be precluded under th[e] bill." *Ibid.*; see *Kumar*, 880 F.3d at 156 (relying on this legislative history); *Alberti* v. *Empresa Nicaraguense De La Carne*, 705 F.2d 250, 253 (7th Cir. 1983) (same).

b. The court of appeals disregarded this legislative history because the House Report "fail[ed] to" distinguish "between '[s]ervice on an embassy by mail,' and service on a minister [of] foreign affairs via or care of an embassy." Pet. App. 102a (citation and emphases omitted). But as discussed above, see p. 15, *supra*, that distinction is merely "semantic." *Kumar*, 880 F.3d at 157.

In any event, the court of appeals misread the legislative history. The House Report disapproved of "attempting to commence litigation against a foreign state" by "mailing * * * a copy of the summons and complaint *to* a diplomatic mission of the foreign state." House Report 26 (emphasis added). Congress thus sought to prevent parties from completing service by mailing process papers to an embassy, regardless of whether the papers are directed to the ambassador—which the court of appeals agreed would violate the statute and the VCDR, see Pet. App. 106a—or to the foreign minister, as occurred here.

B. Certiorari Is Warranted, But *Kumar* Presents A Better Vehicle For The Court's Review

1. As all parties now recognize, the question presented warrants this Court's review.

a. The decision below squarely conflicts with the Fourth Circuit's decision in *Kumar*, *supra*. In both cases, a group of victims of the USS *Cole* bombing allege that petitioner provided material support for the attack. And in both cases, the victims attempted to effect service by requesting that the clerk send documents, directed to the Minister of Foreign Affairs, to the Embassy of the Republic of Sudan in Washington, D.C. The Second Circuit upheld that method of service, while the Fourth Circuit determined that it fails to satisfy

28 U.S.C. 1608(a)(3). See *Kumar*, 880 F.3d at 159 (acknowledging split). Such disparate results on similar facts warrant this Court's review. See Resp. to Pet. at 4, *Kumar*, *supra* (No. 17-1269).

Moreover, the court of appeals' decision is in significant tension with decisions of the Seventh and D.C. Circuits. Although those courts have not directly addressed the method of service respondents attempted here, they have considered closely related questions.

In *Barot* v. *Embassy of The Republic of Zambia*, 785 F.3d 26 (2015), the D.C. Circuit recounted that the plaintiff's first effort to serve her former employer, the Zambian Embassy, had failed to comply with the FSIA because service was "attempted * * * at the Embassy in Washington, D.C., rather than at the Ministry of Foreign Affairs in Lusaka, Zambia, as the Act required." *Id.* at 28. After describing the plaintiff's further failed attempts at service, the court determined that she should be "afford[ed] * * * the opportunity to effect service pursuant to 28 U.S.C. 1608(a)(3)," which "requires serving a summons, complaint, and notice of suit, * * * that are 'dispatched by the clerk of the court,' and sent to the 'head of the ministry of foreign affairs' in Lusaka, Zambia, whether identified by name or title, and not to any other official or agency." 785 F.3d at 29-30 (citation omitted); see *Gates* v. *Syrian Arab Republic*, 646 F.3d 1, 4 (D.C. Cir.) (litigant complied with Section 1608(a)(3) by addressing service to the Syrian Ministry of Foreign Affairs), cert. denied, 565 U.S. 945 (2011); *Transaero*, 30 F.3d at 154 (Section 1608(a)(3) "mandates service of the Ministry of Foreign Affairs.").

The Seventh Circuit has similarly rejected the idea that service through an embassy comports with the

FSIA. In considering attempted service of a motion on a foreign instrumentality, the court explained that "service through an embassy is expressly banned both by an international treaty to which the United States is a party and by U.S. statutory law." *Autotech*, 499 F.3d at 748; see *Alberti*, 705 F.2d at 253 (service on the ambassador is "simply inadequate" under Section 1608(a)(3)).

b. The decision below also threatens harm to the United States' foreign relations. The United States has substantial interests in ensuring that foreign states are served properly before they are required to appear in U.S. courts, and in preserving the inviolability of diplomatic missions under the VCDR. Moreover, the United States routinely objects to attempts by foreign courts and litigants to serve the United States by delivery to U.S. embassies, and thus has a significant reciprocity interest in the treatment of U.S. missions abroad. At the same time, if this Court grants certiorari and holds that respondents' method of service was improper, respondents may be able to correct the deficient service by requesting that the clerk of court send "a copy of the summons and complaint and a notice of suit * * * to the head of the ministry of foreign affairs" of the Republic of Sudan in Khartoum, Sudan. 28 U.S.C. 1608(a)(3); cf. *Kumar*, 880 F.3d at 160 (remanding to the district court "with instructions to allow Kumar to perfect service of process in a manner consistent with this opinion").

2. Although the question presented warrants this Court's review, this case could prove to be a problematic vehicle for resolving it.

Petitioner first challenged respondents' method of service on appeal from the entry of turnover orders filed in the District Court for the Southern District of New York to execute on the default judgment issued by the

District Court for the District of Columbia. Petitioner has filed a motion to vacate the underlying default judgment, which remains pending. See 10-cv-1689 D. Ct. Doc. 55 (June 14, 2015); Pet. 11; Pet. App. 96a n.1; Fed. R. Civ. P. 60(b). Petitioner has not asked the district court to hold its proceedings in abeyance pending this Court's review of the petition for a writ of certiorari. Thus, the district court could vacate or amend its judgment at any time, calling into question the continued validity of the turnover orders at issue here and perhaps mooting this case. See *Walker* v. *Turner*, 22 U.S. (9 Wheat.) 541, 549 (1824).

For example, petitioner's motion to vacate argues, *inter alia*, that the award of punitive damages—which comprise 75% of the judgment, see Pet. App. 22a—is impermissibly retroactive. See 10-cv-1689 D. Ct. Doc. 55-1, at 33-34. The bombing of the USS *Cole* occurred in October 2000, but the statutory provision authorizing punitive damages, 28 U.S.C. 1605A, was enacted in 2008, see National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, Div. A, Tit. X, § 1083(a)(1), 122 Stat. 338. Petitioner's motion to vacate therefore contends that the award of punitive damages was improper because Congress did not clearly indicate its intent for the punitive-damages provision to apply retroactively. 10-cv-1689 D. Ct. Doc. 55-1, at 31-34; see generally *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 266 (1994).

In *Owens* v. *Republic of Sudan*, 864 F.3d 751 (2017), petitions for cert. pending, No. 17-1236 and No. 17-1268 (filed Mar. 2, 2018), the D.C. Circuit accepted petitioner's argument (which in that case supported petitioner's challenge to damages arising from another incident, see *id.* at 762). The court held that Section

1605A operates retroactively, but that Congress did not make "a clear statement authorizing punitive damages for past conduct," and it therefore vacated the punitive damages award under the FSIA. *Id.* at 816; see *id.* at 815-817. In light of the change in controlling circuit precedent, the district court may amend the underlying judgment in this case, which could in turn raise questions about the turnover orders' continued validity.

3. The petition for a writ of certiorari in *Kumar* presents the same question as does this case. See Pet. at i, *Kumar* v. *Republic of Sudan*, No. 17-1269 (filed Mar. 9, 2018). *Kumar*, which arises on direct review of a motion to vacate a default judgment, appears to present a better vehicle for this Court's consideration. *Id.* at 16-17.

The Republic of Sudan, petitioner here and respondent in *Kumar*, states that it is "indifferent" as to which petition this Court grants, but it suggests that *Kumar* presents its own vehicle problems. Resp. to Pet. at 4, 7, *Kumar*, *supra* (No. 17-1269); see generally *id.* at 4-7. Those issues do not appear to present significant vehicle problems. For example, respondent in *Kumar* notes, *id.* at 5, that petitioners there have been granted time to effect proper service on remand from the Fourth Circuit's decision, and that respondent in *Kumar* will then move to dismiss the complaint on other bases. But no such motion has been filed. And even if litigation of such a motion proceeds in the district court, that would not foreclose this Court from deciding the question presented, which would determine whether the default judgment in that case should have been set aside and thus whether the proceedings on remand should have occurred in the first place.

Because the question presented warrants review, and because *Kumar* provides a better vehicle for this

Court's consideration, this Court should grant the petition for a writ of certiorari in *Kumar*, and hold this petition pending its disposition of that case. In the alternative, to ensure that the Court may decide the question presented, the Court may wish to grant certiorari in both cases and consolidate them for review.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's consideration of the petition for a writ of certiorari in *Kumar* v. *Republic of Sudan*, No. 17-1269 (filed Mar. 9, 2018), and then be disposed of as appropriate. In the alternative, if the Court grants the petition in *Kumar*, the Court may wish to grant certiorari in this case and consolidate it with *Kumar* for consideration of the merits.

Respectfully submitted.

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RECORD AND BRIEFS

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No. 16-1094

IN THE

Supreme Court of the United States

REPUBLIC OF SUDAN,

Petitioner,

v.

RICK HARRISON, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* GOVERNMENT OF NATIONAL ACCORD, STATE OF LIBYA IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE

The *amicus curiae* is the newly-established government of Libya, which joins in support of the petitioner to present the perspective of, and unique challenges faced by, fledgling and transitional nations with respect to international service of process.[1] Libya has a substantial interest in ensuring that it is served properly before it is required to appear in a foreign court, as well as in defending the inviolability of its diplomatic mission under the Vienna Convention on Diplomatic Relations ("VCDR").

SUMMARY OF ARGUMENT

Diplomatic inviolability guaranteed by treaty under the VCDR prohibits intrusion onto diplomatic premises—even by mailings—for the purpose of serving process. The Foreign Sovereign Immunities Act ("FSIA") provides the sole and exclusive means of obtaining personal jurisdiction over a foreign sovereign and must be read in harmony with the United States' existing treaty obligations. Accordingly, FSIA Section 1608(a)(3) should be interpreted as barring service by mail on a sovereign government via or "in care of" its foreign embassy.

---

[1] Counsel for all parties have consented to the filing of this brief and their notices of consent have been filed with the Clerk. No counsel for a party in this case authored this brief in whole or in part. No person or entity—other than the *amicus*, its members, or its counsel—made a monetary contribution to fund the preparation or submission of this brief.

ARGUMENT

Libya takes no position with respect to the underlying facts in the matter before the Court. Libya strongly condemns all forms, and acts, of terrorism. Although Libya's former pre-revolution regime was the subject of terror-related litigation in the United States, Libya resolved these claims fully in 2008 pursuant to a bilateral settlement agreement with the United States. Libya is now governed by a democratically elected government that works cooperatively with the United States and other nations to combat terrorism. Indeed, Libyan forces have recently worked closely with the United States military to combat ISIL and other violent extremist organizations.

Since the revolution in 2011, Libya has undergone a difficult and challenging transition to democracy. Throughout this tumultuous period, Libya has maintained a diplomatic presence in the United States via its embassy in Washington, D.C. During this period, Libya has been subject to a handful of commercial legal disputes in the United States. As a result, Libya has experienced first-hand the difficulties that can arise from attempts to serve process on a nation that is experiencing political strife. In a striking parallel to the issues presented by this case, in 2015, a litigant in a commercial dispute attempted to serve the Libyan government with a complaint via the Libyan embassy in Washington, D.C. *See United Healthcare Ins. Co. v. Libyan Student Plan, et al.*, Case No. 1:15-cv-00760 (D.D.C. dismissed May 26, 2016). The circumstances

involved in that dispute—in which, for a time, two competing factions both claimed to be the legitimate government of Libya—are illustrative of the potential service of process difficulties that can arise in developing or revolutionary states.

In the midst of ongoing civil strife and threats to the new Libyan government, the plaintiff attempted to effect service on Libya by mailing the service documents to the Libyan embassy in the Watergate building in Washington, D.C., rather than addressing them directly to the head of Libya's foreign ministry in Tripoli, as required by under the FSIA. 28 U.S.C. § 1608(a)(3). Ultimately, Libya was served with the complaint via diplomatic channels pursuant to FSIA Section 1608(a)(4) after service under the preceding section failed. However, the improper attempt to serve Libya via its embassy under Section 1608(a)(3) distracted diplomatic personnel from their official duties and also caused uncertainty about the date on which Libya had been effectively served.

That is exactly the kind of uncertainty that the direct service requirements of FSIA Section 1608(a)(3) were designed to prevent and which transitional states like Libya can least afford. Not all states enjoy the level of political stability and continuity of nations like the United States or the E.U. member nations, in which litigants reasonably can expect normal diplomatic and political functions to continue regardless of world events. Yet, it is these transitional states that have the most at stake in terms of international service of process. For such nations, the connection between their embassies and

their home government can be, at times, uncertain. Moreover, transitional states—often laboring under severe financial constraints—have the most to lose from the entry of a default judgment brought about by improper "forwarding" of service materials directed to one of their foreign embassies. Simply put, developing and transitional nations cannot afford the substantial risks of leaving service of process—and, by extension, the specter of default judgment—in the hands of often-transitory embassy staff who lack any delegated authority over legal matters from their home government. And, pursuant to the diplomatic inviolability guaranteed by treaty under Article 22 of the VCDR, they should not have to.

Finally, the Second Circuit's apparent assumption that embassy personnel may be relied on to transmit service materials to the appropriate authority in their home state is flawed. In states affected by unrest, it is all too common for normal channels of communication and routine government functioning to break down. In such circumstances, it is unrealistic to expect embassy or consulate personnel—who themselves may be involved in or preoccupied with disruptions in their home state or in fact are third-country nationals—to always be able to transmit service materials to authorities in the home state in a timely fashion.

Indeed, such transmission may be impossible or impractical where, for example, diplomatic pouch service between the foreign embassy and home nation are disrupted or where embassy personnel are uncertain as to whom the current government

recognizes as the acting foreign minister. For such nations in flux, the best guaranty that service of process will be made to the current and actual representative of the recognized government is strict compliance with the protections embodied in Section 1608(a)(3). While no process is ever perfect or can ensure that service reaches the appropriate recipient, direct service to the ministry of foreign affairs *in the foreign state* provides the best chance that service will reach the recognized authority of the recipient nation. And failing that, the appropriate next course is service under Section 1608(a)(4) via State Department channels.

Accordingly, Libya joins with the petitioner in urging this Court to adopt the view that (1) FSIA Section 1608(a)(3) does not permit service on a sovereign government via or "in care of" its foreign embassy; and (2) in any event, service upon a foreign embassy with the presumption that service documents will be "forwarded" to the home government constitutes an impermissible intrusion onto diplomatic premises in violation of the VCDR.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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IN THE
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RICK HARRISON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
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QUESTION PRESENTED

Whether the Second Circuit erred by holding — in direct conflict with the D.C., Fifth, and Seventh Circuits and in the face of an amicus brief from the United States — that plaintiffs suing a foreign state under the Foreign Sovereign Immunities Act may serve the foreign state under 28 U.S.C § 1608(a)(3) by mail addressed and dispatched to the head of the foreign state's ministry of foreign affairs "via" or in "care of" the foreign state's diplomatic mission in the United States, despite U.S. obligations under the Vienna Convention on Diplomatic Relations to preserve mission inviolability.

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INTEREST OF AMICI CURIAE[1]

Amici curiae listed in the Appendix are law professors and scholars at U.S. law schools who teach, research, and write about international law, both public and private. They share a common view that United States courts must properly apply international treaties to which the United States is a party, thereby adhering to its international legal obligations.

INTRODUCTION

This case involves a $314 million default judgment rendered against a foreign sovereign based upon two crucial findings by the Second Circuit: (1) that a foreign embassy is a proper conduit for service of process under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1608(a)(3); and (2) that acceptance of a mail parcel by an embassy's mail room constitutes "consent of the head of the mission" to receive service of process under the Vienna Convention on Diplomatic Relations ("VCDR"), 23 U.S.T. 3227, TIAS 7502 (1972). Each of these findings creates a serious circuit split, and jeopardizes long-held principles of international law and diplomacy critical to the foreign policy of the United States. *Amici curiae* submit this brief to

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. The parties were notified 10 days prior to the filing of this brief pursuant to Supreme Court Rule 37.2 and have consented to its filing. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court.

elaborate on the reasons why the conflict among the circuit courts on these issues is an important and troubling one that merits resolution by this Court.

While conceding that service of process *on* an embassy is disallowed by the FSIA, the Second Circuit held that service of process *via* an embassy is perfectly fine. Pet. App. 105a-106a. The FSIA, however, provides that service on a foreign state under 28 U.S.C. § 1608(a)(3) must be made by "any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." U.S. courts require "strict adherence" to these terms when serving a foreign sovereign. *See Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994).

But any service of process on a foreign sovereign must also comply with the VCDR, article 22(1) of which provides that:

> [t]he premises of [a diplomatic] mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

This inviolability of diplomatic missions is a fundamental and longstanding principle of international law. The Second Circuit's decision to allow service of process *via* an embassy is unprecedented and represents a serious erosion of this principle, impairing the performance of diplomatic functions and impinging upon the dignity of foreign embassies in the United States, contrary to the text, practice, and purpose of the VCDR.

Customary international law instead requires that service be made upon the Ministry of Foreign Affairs of the served state, and not upon an embassy of that state.

Further, while the Second Circuit conceded that "consent of the head of the mission" was necessary to overcome the mission's inviolability under the VCDR, it found that the "Embassy's acceptance of the service package *surely constituted* 'consent.'" Pet. App. 107a (emphasis added). However, the "head of the mission" is a defined term in the VCDR, denoting the foreign sovereign's Ambassador or *chargé d'affaires* (an individual who heads an embassy in the absence of the ambassador). VCDR, art. 1(a), 14. Because there is no evidence in this case that the "head of the mission" was ever made aware of the service package, much less consented to the embassy's receipt of service, the premises of the mission remained inviolable, and no delivery of service could properly be made on it. The Second Circuit's decision to the contrary, which infers "consent" from a mail room employee's "acceptance of the service package," is unprecedented, dangerous, and creates a circuit split with other courts of appeals that have considered similar language in other international treaties.

The Second Circuit—which is home to numerous diplomatic missions, foreign consulates, trade missions, and missions to the United Nations—is out of step both with other Circuits and with the VCDR on these issues. This Court should take up the petition and correct the decision below to bring the United States in line with generally accepted international rules and practice.

ARGUMENT

I. THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS DISALLOWS SERVICE OF PROCESS ON A STATE VIA ITS EMBASSY.

The VCDR, adopted in 1961 and ratified by the United States in 1972,[2] represents an essential instrument for the conduct of foreign relations. Among other things, it codified what had long been an established tenet of customary international law, namely the principle of diplomatic immunity from civil and criminal proceedings.[3] Virtually every country on earth is a party to the VCDR.[4]

The VCDR states that it is intended to "contribute to the development of friendly relations among nations," and that the privileges and immunities that it provides help to "ensure the efficient performance of the functions of diplomatic missions as representing states." VCDR, preamble. Article 3 of the VCDR identifies five essential functions provided by diplomatic missions:

> (a) Representing the sending State in the receiving State;

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[2] 23 UST 3227, TIAS 7502 (1972).

[3] Anderson, Matthew Smith, *The Rise of Modern Diplomacy 1450-1919*, at 53-54 (Longman, 1993).

[4] 191 states are party to the VCDR. *See* United Nations Treaty Collection, *Vienna Convention on Diplomatic Relations* https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&clang=_en.

(b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;

(c) Negotiating with the Government of the receiving State;

(d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State; and

(e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

The VCDR recognizes that respect for the privileges and immunities of diplomatic missions is essential in order for the sending state to properly perform these diplomatic functions. VCDR, preamble. For example, diplomatic agents enjoy complete immunity from the criminal jurisdiction of the host state, and immunity from all civil and administrative jurisdiction, except in narrow circumstances in which they are acting outside of their official capacity. *See* VCDR, art. 31(1).

Of particular relevance to the present case is the VCDR's guarantee that "[t]he premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission." VCDR, art.

22(1). As the U.S. State Department explains, no entry can be made without permission and consent, "even to put out a fire."[5]

Moreover, the VCDR places a "special duty" on the host state to "take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity." VCDR, art. 22(2).

U.S. courts are cognizant that service of process upon a diplomat or diplomatic mission "might impair the performance of diplomatic functions or otherwise impinge upon a diplomat's dignity." *See Tachiona v. United States*, 386 F.3d 205, 223-224 (2d Cir. 2004) (rejecting service on diplomatic personnel). For example, in the *Hellenic Lines* case, which arose before the FSIA was enacted, the D.C. Circuit rejected service on an ambassador on behalf of "his sending state." *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 980 (D.C. Cir. 1965). The D.C. Circuit found that such service "would prejudice the United States foreign relations and would probably impair the performance of diplomatic functions," and therefore concluded that "the purposes of diplomatic immunity forbid service in this case." *Id.* at 980-81.

In *Hellenic Lines*, the court agreed with the Department of State that diplomatic personnel would be "hampered in the performance of [their] duties if . . . [they] were diverted from the performance of

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[5] *See* U.S. State Department, *What is a U.S. Embassy?*, https://diplomacy.state.gov/discoverdiplomacy/diplomacy101/places/170537.htm (last visited Apr. 8, 2017).

[their] foreign relations functions by the need to devote time and attention to ascertaining the legal consequences, if any, of service of process having been made, and to taking such action as might be required in the circumstances." *Id.* at 980 n.5. Further, "[t]he sending state might well protest to the Department that the United States had failed to protect the person and dignity of its official representative" and that "[o]ther governments might interpret the incident as meaning that the Government of the United States had decided, as a matter of policy, to depart from what they had considered a universally accepted rule of international law and practice." *Id.*

While the *Hellenic Lines* case entailed service by a United States Marshal, a concurring judge observed that "although service of process on an ambassador by registered mail might avoid some of the problems inherent in personal service by a marshal, it would raise others." *Id.* at 982-83 (Washington, J., concurring) (quotation omitted).

As Petitioner and the United States have already noted, such problems include the threat to foreign relations and to U.S. interests posed by the Second Circuit's decision in this case. *See* Pet. at 5; Pet. App. at 144a-145a. By allowing service of process to be mailed to an embassy, the Second Circuit's decision results in an uninformed and non-consensual waiver of the mission's inviolability. Further, foreign diplomatic personnel will be required to divert time and attention from their diplomatic duties to determine what they should do with a package mailed to a (former) Minister of Foreign Affairs who is not resident at the embassy.

It is unclear what an embassy is to do upon being faced with service of process. It may reject the mailing, Pet. App. at 107a, but would have to do so without knowing its contents. As the Second Circuit found, once receipt has been acknowledged, diplomatic personnel are then "expected" to deliver the mailing to the Minister of Foreign Affairs, including potentially placing the service package into the diplomatic pouch. Pet. App. at 98a & n.3.

The burden on the embassy is exacerbated by the very circuit split upon which this amicus brief is predicated. If the mailing comes from a court in the D.C., Fifth, or Seventh Circuits, then it should be treated as ineffective. *See, e.g., Barot v. Embassy of the Republic of Zambia*, 785 F.3d 26, 29-30 (D.C. Cir. 2015) ("[T]he [FSIA] require[s]" service "at the Ministry of Foreign Affairs in [the foreign country]" rather than "at the Embassy in Washington, D.C."). If the mailing comes from a court in the Second Circuit, the embassy clearly is under a different obligation, namely to forward the package and the foreign state has a responsibility to appear. If the mailing comes from another circuit, it is unclear how the embassy should treat the package. With hundreds of millions or billions of dollars in default judgments on the line, embassy personnel will almost certainly need to retain U.S. counsel simply to determine what they should do with the service package, thereby distracting them from their normal foreign policy duties. Without a clear ruling from this Court, foreign states may be subject to unintended legal consequences in pending litigation based on their actions or failure to act.

Ultimately, embassies would need to become far more careful about accepting mail deliveries, and may end up adopting specific policies limiting the mail that they are willing to receive. For embassies to limit their communications with the host state in order to avoid complicated issues of service—or worse yet, massive default judgments—would undermine their ability to perform their diplomatic mission.

As the United States further observed in its *amicus* brief below, the Second Circuit's decision also impinges upon the dignity of the diplomatic mission, as it "dictate[s] the internal procedures of the embassy of another sovereign" by "instructing it to use its [diplomatic] pouch to deliver items to its officials on behalf of a third party." Pet. App. at 144a. Diplomatic agents are not couriers or agents for delivery of parcels to their home country, and should not be required to act as such by U.S. law.

That service on a foreign state via its embassy is not in accord with the text or the principles of the VCDR is further supported by the international consensus rejecting any attempt to serve process on a foreign state via its embassy or diplomatic personnel. *See, e.g., Kuwait Airways Corp. v. Iraqi Airways Co. & Republic of Iraq* [1995] 1 WLR 1147 (United Kingdom's highest court rejecting service on the Iraqi embassy with a "request . . . to forward the writ . . . to the Iraqi Ministry of Foreign Affairs"); *Sistem Mühendislik Insaat Sanayi Ve Ticaret Anonim Sirketi v. Kyrgyz Republic*, 126 O.R. (3d) 545; 2015 ONCA 447 (Canadian appellate court rejecting service on the Kyrgyz Embassy and noting that "service on an embassy is not available as a means of

effecting service on a foreign state"); *see also Sebina v. South African High Commission* 2010 3 BLR 723 IC (Botswana court rejecting personal service ostensibly accepted by the South African High Commission[6]); *Village Holdings Sdn. Bhd. v. Her Majesty the Queen in Right of Canada* [1988] 2 MLJ 656 (Malaysian Court rejecting personal service upon the Queen by leaving papers at the Canadian High Commission).

Significantly, neither Plaintiff in this case nor the Second Circuit has cited to *any* state party to the VCDR that allows service of process on a foreign state via its embassy. Sudan and the United States are both parties to the VCDR, and both appear to agree that service of process via an embassy is not allowed by the treaty. As this Court has previously explained, "[w]hen the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, *we must*, absent extraordinarily strong contrary evidence, *defer to that interpretation*." *Sumitomo Shoji Am. v. Avagliano*, 457 U.S. 176, 185 (1982) (emphasis added).

Requiring foreign embassies to deal with U.S. service of process law and act as couriers or agents for the delivery of legal documents is not necessary, is detrimental to the important purposes that diplomatic missions serve in the United States, and undermines one of the fundamental principles of international diplomacy—the inviolability of diplomatic missions. It also diverges from the

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[6] Commonwealth countries refer to their diplomatic missions as High Commissions rather than embassies.

understanding of the parties to the VCDR, who agree that service via an embassy is not allowed. The United States also has a strong interest in treating foreign embassies as it wants its own embassies treated abroad, and if the Second Circuit decision is allowed to stand, it threatens to allow service of process by foreign courts on United States embassies around the world.

There is a better way. As explained further below, customary international law recognizes the proper method of serving foreign sovereigns—a method that does not interfere in the role of diplomatic missions.

II. CUSTOMARY INTERNATIONAL LAW SPECIFICALLY CONTEMPLATES SERVICE OF PROCESS ON A STATE'S MINISTRY OF FOREIGN AFFAIRS.

In drafting the FSIA, Congress knowingly codified the principles of sovereign immunity "recognized in international law." *See* H.R. Rep. No. 94–1487, at 2 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6605 (recognizing that the principles of sovereign immunity in the FSIA were "regularly applied against the United States in suits . . . in foreign courts").

The customary international law of diplomatic immunity has more recently been reaffirmed in prominent international law instruments. These instruments include the United Nations Convention on Jurisdictional Immunities of States and their Property. G.A. Res. 59/38, Annex, U.N. Doc. A/RES/59/38 (Dec. 2, 2004) ("the 2004 Convention"); *see also Wallishauser v. Austria*, Application No.

effecting service on a foreign state"); *see also Sebina v. South African High Commission* 2010 3 BLR 723 IC (Botswana court rejecting personal service ostensibly accepted by the South African High Commission[6]); *Village Holdings Sdn. Bhd. v. Her Majesty the Queen in Right of Canada* [1988] 2 MLJ 656 (Malaysian Court rejecting personal service upon the Queen by leaving papers at the Canadian High Commission).

Significantly, neither Plaintiff in this case nor the Second Circuit has cited to *any* state party to the VCDR that allows service of process on a foreign state via its embassy. Sudan and the United States are both parties to the VCDR, and both appear to agree that service of process via an embassy is not allowed by the treaty. As this Court has previously explained, "[w]hen the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, *we must*, absent extraordinarily strong contrary evidence, *defer to that interpretation*." *Sumitomo Shoji Am. v. Avagliano*, 457 U.S. 176, 185 (1982) (emphasis added).

Requiring foreign embassies to deal with U.S. service of process law and act as couriers or agents for the delivery of legal documents is not necessary, is detrimental to the important purposes that diplomatic missions serve in the United States, and undermines one of the fundamental principles of international diplomacy—the inviolability of diplomatic missions. It also diverges from the

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[6] Commonwealth countries refer to their diplomatic missions as High Commissions rather than embassies.

understanding of the parties to the VCDR, who agree that service via an embassy is not allowed. The United States also has a strong interest in treating foreign embassies as it wants its own embassies treated abroad, and if the Second Circuit decision is allowed to stand, it threatens to allow service of process by foreign courts on United States embassies around the world.

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156/04, Judgment, 19 November 2012 (ECtHR) (finding that the 2004 Convention constitutes customary international law binding on both Austria and the United States for purposes of service of process on a foreign sovereign). While the 2004 Convention itself has not yet entered into force, it provides guidance as to the customary international law requirements for service of process on foreign sovereigns. Article 22 of the Convention, much like the FSIA in 28 U.S.C. § 1608(a)(1) and (2), allows for service by special arrangement or international convention. But if neither of these means is available, then the 2004 Convention contemplates "transmission through diplomatic channels *to the Ministry of Foreign Affairs* of the State concerned," and provides that "Service of process . . . is deemed to have been effected *by receipt of the documents by the Ministry of Foreign Affairs*." 2004 Convention, art. 22(1)(c)(i),(2) (emphasis added).

The 2004 Convention was based upon earlier work done by the International Law Commission, which in 1991 published draft articles on jurisdictional immunities.[7] The commentary to the ILC Draft Articles—which are substantially similar to the 2004 Convention—explains that "[s]ince the time of service of process is *decisive* for practical purposes . . . in the case of transmission through diplomatic channels *or by registered mail*, service of process is deemed to have been effected on the day of receipt of the documents *by the Ministry of Foreign Affairs*." ILC Yearbook, 1991, Vol. II, Part 2, p. 60, §

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[7] *See* ILC Draft Articles on Jurisdictional Immunities of States and Their Property, ILC Yearbook, 1991, Vol. II, Part 2, p. 60, §§ 1-3.

3 (emphasis added). The commentary further notes that "too liberal or generous a regime of service of process . . . could result in an *excessive number of judgments in default* of appearance by the defendant State." *Id.* § 1 (emphasis added).

Customary international law thus recognizes that, absent other specifically agreed upon means, the only effective way to serve process on a foreign sovereign—including by "registered mail"—is by service on "the Ministry of Foreign Affairs." This is in accord with the FSIA, which requires that the registered mail be "addressed and dispatched . . . to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. § 1608(a)(3).

As this Court long ago explained, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 81 (1804). Thus, even if the Second Circuit were correct that the FSIA is ambiguous as to where a service package addressed to "the head of the ministry of foreign affairs" may be sent, customary international law—the "law of nations"—clearly provides that it should be sent to the Ministry of Foreign Affairs, and that service is only effective once it has been received by that Ministry. This makes eminent sense both in terms of the plain language of the FSIA and as an effective means of avoiding an "excessive number of judgments in default" against foreign governments.

Neither the 2004 Convention nor the ILC Draft Articles even mention the possibility of serving process on a foreign state via that state's embassy. They thereby reaffirm the VCDR's prohibition on the

use of embassies for service of process upon a foreign state.

In order to uphold the very purpose of diplomatic missions, avoid violating customary international law, and give effect to the parties' interpretation of the VCDR, this Court should therefore grant the petition, and ultimately find that serving process via an embassy is in violation of the VCDR and the United States' international obligations.

III. SERVICE OF PROCESS ON AN EMBASSY REQUIRES "CONSENT OF THE HEAD OF THE MISSION."

In its opinion on rehearing, the Second Circuit acknowledged that the VCDR expressly bars host state agents from entering the premises of a diplomatic mission "except with the consent of the head of the mission." Pet. App. at 107a (quoting VCDR, art. 22(1)). However, the Second Circuit determined that the "Embassy's *acceptance of the service package surely constituted 'consent'*." *Id.* (emphasis added). This conclusion is unjustified under the VCDR.

The VCDR does not simply require some form of "consent;" it specifically requires the consent "*of the head of the mission.*" *See* VCDR, art. 22(1) (emphasis added). The "head of the mission" is a specific individual defined by the text of the VCDR as the person "charged by the sending State" with that duty. VCDR, art. 1(a). Specifically, the "head of the mission" may only take up his post after "present[ing] his credentials" to the receiving State. VCDR, art. 13(1). "Heads of mission" are explicitly

identified as one of three classes: "ambassadors," "envoys," or "*chargés d'affaires*." VCDR, art. 14.[8]

The VCDR contains guidance regarding the "members of the staff of the mission," which includes the "members of the diplomatic staff, of the administrative and technical staff and of the service staff." VCDR, art. 1(c). The "administrative staff" is employed in the "administrative . . . service of the mission." *Id.*, art. 1(f). Only the "diplomatic staff," however, "should in principle be of the nationality of the sending State." *Id.*, art. 8(1). The U.S. State Department explains that "it is necessary to hire citizens from the host country to fill jobs at both embassies and consulates,"[9] and fills positions, such as "Mailroom Clerk," in its own missions abroad with host country nationals.[10] Thus, the individual receiving the mail is not the "head of the mission" or even a member of the diplomatic staff, and possibly not a national of the foreign state at all. Such an individual is neither competent nor authorized to make decisions regarding acceptance of legal process on behalf of the foreign state.

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[8] Other heads of mission of equivalent rank are also allowed by the VCDR, including nuncios and internuncios from the Holy See, High Commissioners within the Commonwealth, etc.

[9] U.S. State Department, *What is a U.S. Embassy?*, https://diplomacy.state.gov/discoverdiplomacy/diplomacy101/places/170537.htm (last visited Apr. 8, 2017).

[10] See, e.g., *United States Mission Vacancy Announcement: Mailroom Clerk*, https://ca.usembassy.gov/wp-content/uploads/sites/27/2016/04/16-44-Mailroom-Clerk-Toronto.pdf (last visited Apr. 8, 2017) (offering a position as a "Mailroom Clerk" in charge of "unclassified mail" at the U.S. Embassy in Ottawa, Canada to host-country nationals).

Determining that a mailroom clerk's consent suffices for the "consent of the head of the mission"—as the Second Circuit's decision does—may lead to significant mischief, as host state agents may easily get implied "consent" from low-level employees to enter onto embassy premises. It is to prevent such abuses that the VCDR specifies that the "consent" must come from the "head of the mission." Requiring a specific individual's consent avoids an unknowing waiver of the mission's inviolability.

The Second Circuit's decision also conflicts with circuit courts that have considered similarly worded treaties. Both the Eleventh and D.C. Circuits, for example, have considered similar language under an international treaty between Austria and the Organization of the Petroleum Exporting Countries ("OPEC") that allows service only with the "consent of . . . the [OPEC] Secretary General." *See Prewitt Enters. v. OPEC*, 353 F.3d 916, 923 (11th Cir. 2003); *Freedom Watch, Inc.* v. *OPEC*, 766 F.3d 74 (D.C. Cir. 2014).[11] In *Prewitt*, as in this case, the pleadings were sent by "registered mail, return receipt requested." *Prewitt*, 353 F.3d at

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[11] As the Eleventh Circuit noted, similar treaty provisions requiring consent by a specified individual are found in Headquarters Agreements between sovereign states and international organizations around the world. *Prewitt*, 353 F.3d at 923 n.12. One such example is the United Nations Headquarters Agreement, which states that "The headquarters district shall be inviolable. . . . The service of legal process, including the seizure of private property, may take place within the headquarters district *only with the consent of* and under conditions approved by *the Secretary-General*." *See* United Nations Headquarters Agreement, Art. III, § 9, *available at* 22 U.S.C. § 287 (emphasis added).

919. "The pleadings were signed for, stamped 'received' by OPEC's Administration and Human Resources Department, and forwarded to the Director of OPEC's Research Division as well as other departments including the Secretary General's office." *Id.* at 919-20. Possibly relying on the ineffective service, "the Secretary General decided that the OPEC Secretariat would not take any action with regard to the summons and complaint." *Id.* at 920. As in this case, when the defendant failed to appear, the trial court rendered a default judgment. *Id.* OPEC then made a special appearance to challenge service, and the Eleventh Circuit determined, based on the wording of the treaty, that the acceptance of a service mailing by OPEC did not constitute the "consent of . . . the [OPEC] Secretary General" and that service was therefore ineffective. *Id.* at 925.

The D.C. Circuit followed this reasoning in *Freedom Watch*, where the plaintiff attempted to deliver service "by hand to OPEC headquarters in Vienna, where an individual ostensibly accepted service." 766 F.3d at 77. The D.C. Circuit found that without the consent of OPEC's Secretary General, service was ineffective, despite the ostensible acceptance of a service package by an employee. *Freedom Watch*, 766 F.3d at 80.

In the *Hellenic Lines* case, the D.C. Circuit explained what "consent" in this context would require. As noted above, *Hellenic Lines* involved an attempt to serve an ambassador with a complaint against "his sending state." *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 980 (D.C. Cir. 1965). The D.C. Circuit noted that "an ambassador may be served if

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The Second Circuit's decision also conflicts with circuit courts that have considered similarly worded treaties. Both the Eleventh and D.C. Circuits, for example, have considered similar language under an international treaty between Austria and the Organization of the Petroleum Exporting Countries ("OPEC") that allows service only with the "consent of . . . the [OPEC] Secretary General." *See Prewitt Enters. v. OPEC*, 353 F.3d 916, 923 (11th Cir. 2003); *Freedom Watch, Inc.* v. *OPEC*, 766 F.3d 74 (D.C. Cir. 2014).[11] In *Prewitt*, as in this case, the pleadings were sent by "registered mail, return receipt requested." *Prewitt*, 353 F.3d at

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he consents to service," but posited that the burden of securing such consent "should rest on the party seeking service." *Id.* n.3. The concurrence noted that the plaintiff would need to make a "showing that the Ambassador has consented, or is authorized, to accept service on behalf of the government which he represents for diplomatic purposes in this country." *Id.* at 981-82 (Washington, J., concurring). The concurrence also stated that "informal inquiries" had been made as to "whether the Embassy of Tunisia would be willing to accept service of summons in this case," and determined that it was "unwilling to accept service of process." *Id.* at 982. Because consent was not forthcoming from the embassy, process could not be served on the foreign state via the embassy or its personnel. *Id.* at 983.

The Second Circuit's finding that acceptance of registered mail by a mailroom employee constitutes implied "consent" by the "head of the mission" is squarely at odds with the text of the VCDR, the holdings of *Prewitt* and *Freedom Watch*, and the dicta from *Hellenic Lines* that actual consent by the specified individual is required. Securing such consent prior to delivery would obviate many of the foreign policy concerns present in this case, as a senior diplomatic official from a foreign government would have agreed to service of process, and would be taking responsibility for ensuring service to the Minister of Foreign Affairs.

CONCLUSION

For the foregoing reasons, *amici curiae* international law professors support Petitioner Republic of Sudan's petition for certiorari, and respectfully request that the petition be granted.

Respectfully submitted,

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APPENDIX

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[1] Universities are mentioned only for identification purposes and not as an endorsement.

RECORD AND BRIEFS

APR 10 2017

Case No. 16-1094

In the Supreme Court of the United States

REPUBLIC OF SUDAN,

Petitioner,

v.

RICK HARRISON, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE KINGDOM OF SAUDI ARABIA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

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INTEREST OF THE *AMICUS CURIAE*

Amicus curiae the Kingdom of Saudi Arabia (the "Kingdom") is a foreign sovereign and an international ally of the United States.[1] It submits this brief to assist the Court in understanding the crucial importance of the inviolability (and attendant immunity from service of process) of embassies and other missions of foreign states to the United States. The Second Circuit's decision squarely violates international law principles codified in the Vienna Convention on Diplomatic Relations and companion treaties, decades of customary international law, and the United States government's own longstanding position as expressed in diplomatic communications and to courts around the world.

The Kingdom has a robust diplomatic presence in the United States through its embassy in Washington, consulates in New York, Houston and Los Angeles, and its United Nations mission in New York. As much as any foreign state, the Kingdom has a strong interest in preserving the inviolability of foreign missions, enforced in part by the prohibition against serving legal process at mission premises. That prohibition, rooted in international law, is reflected in U.S. domestic law through the Foreign Sovereign Immunities Act ("FSIA")

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[1] The parties have consented to the filing of this brief. Counsel of record for both parties received timely notice of *amici curiae*'s intention to file this brief, and letters of consent have been lodged with the Clerk of the Court, pursuant to Supreme Court Rules 37.2 and 37.5. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission.

provisions regulating how legal process may be served in actions against a foreign state. Strict adherence to these principles has a direct and recurring practical impact on the Kingdom, which (along with its agencies and instrumentalities) is often improperly served with legal process at its U.S. embassy, consulates, and U.N. mission. *See, e.g.*, Summons, *862 Second Ave. LLC v. 2 Dag Hammarskjold Plaza Condos.*, No. 1:16-cv-08551 (S.D.N.Y. Nov. 2, 2016), ECF No. 1 (service of summons and complaint attempted by delivery to receptionist at the Kingdom's Consulate General in New York). As the Kingdom does not have a standing special arrangement, and is not a party to any convention providing for service of process in U.S. legal matters, the Kingdom has a particular interest in ensuring that U.S. litigants adhere to the service method provided in the FSIA, 28 U.S.C. §1608(a)(3), which conforms to the mission-inviolability protections of the Vienna Convention.

Allowing service of process on any embassy or other mission, place, or person subject to inviolability would undermine the certainty that allows the Kingdom and other foreign sovereigns to ensure an organized and timely response to U.S. litigation. The Second Circuit's decision is especially problematic as it casts doubt on the inviolability of missions to the United Nations in New York. For these reasons, review by this Court is needed to provide clarity and guidance in this area.

SUMMARY OF ARGUMENT

This Court should grant *certiorari* to correct the Second Circuit's aberrational holding, at odds with

decades of law and consistent practice under the Vienna Convention on Diplomatic Relations ("VCDR"), Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, and the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1608 (2017), that service of process on a foreign state can be made "via" its U.S. embassy. The VCDR prohibits such transgression on the inviolability of a foreign mission, and the FSIA in these circumstances authorizes service only on a sovereign state's minister for foreign affairs.

The inviolability of foreign missions under VCDR Article 22 codifies longstanding custom and practice and is a cornerstone of modern diplomacy. The United States, the Kingdom, and countries across the globe have long taken the position that, as a result of the inviolability of foreign missions, service of process cannot be made on an embassy. In fact, upon the urging of the State Department, Congress modified an earlier version of Section 1608 of the FSIA to eliminate provisions that would have allowed service via a foreign state's embassy.

Disregarding this history, the Second Circuit fashioned an artificial distinction between service "on" an embassy and service "via" an embassy—a holding that violates both the VCDR and the FSIA. Service "via" an embassy is nothing but a fig-leaf when, as in this case, the district court found that service was effective when the *embassy* received the package—not when it was received by the minister for foreign affairs. That holding allows American courts to commandeer a foreign sovereign's diplomatic pouch, a practice forbidden by Article 27 of the VCDR and international practice. The decision below also directs courts to

violate Section 1608's requirement that service be "addressed and dispatched" to the foreign minister.

The Second Circuit's decision contradicts the United States' longstanding position on service. The U.S. regularly refuses to acknowledge service by mail on its embassies and other international facilities, properly requiring that official notice of the case be submitted by diplomatic channels. This position is substantially undermined by the Second Circuit's decision.

Finally, the Second Circuit's decision raises practical difficulties. The plaintiff may never learn when service is complete as embassies will not state when the service of process has arrived at the office of the foreign minister. Embassies may also feel constrained to discard or reject all forms of legal correspondence, limiting the assistance they may receive from their own lawyers. The decision also creates a circuit split in an area of law for which it is important that the federal courts and government speak with one voice.

The Kingdom respectfully urges this Court to grant the writ of *certiorari*.[2]

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[2] The Kingdom has no knowledge of the underlying facts here and accordingly focuses on the isolated legal issue before the Court.

ARGUMENT

I. The Inviolability Of Embassies Is A Cornerstone of International Law.

A. The Inviolability Provisions of the VCDR Are Critical to Foreign Relations.

The Second Circuit's decision extinguishes a critical part of the inviolability ensured by the VCDR.[3] The VCDR is one of the most universally-accepted sources of international law, and it resulted from American-led effort to codify customary rules of diplomatic relations dating back to the sixteenth century. The practice of granting diplomatic immunity, of course, stretches back millennia. *See United States* v. *Enger*, 472 F. Supp. 490, 504 (D.N.J. 1978) ("The ancient Greeks, as the first to regularize diplomatic relations, included in their practice the exchange of ambassadors and concomitant personal inviolability.").

The centerpiece of the VCDR is its codification of diplomatic protection with the "categorical" and "strong" word for immunity: "inviolable." *767 Third Avenue Associates* v. *Permanent Mission of the Republic of Zaire to the United Nations*, 988 F.2d 295, 298, 302 (2d Cir. 1993) ("[F]ederal courts must defer to the language of Article 22."). Inviolability is a necessary precondition to open discussions between nations and a key to diplomacy. As the

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[3] Similar protection against the inviolability of consulates is codified in the Vienna Convention on Consular Relations, art. 31, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

International Court of Justice explained (in a case initiated by the United States), "[t]here is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose." *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S.* v. *Iran)*, 1979 I.C.J. 7, 19 (Dec. 15).

The inviolability provisions of Article 22 of the VCDR negate the prospect of service of process on an embassy. Instead, service can be accomplished by direct mail to the head of the ministry of foreign affairs of the foreign state under Section 1608(a)(3), unless the foreign state objects to such service (as does the United States). In that case, as the State Department provides, service via diplomatic channels may be accomplished under Section 1608(a)(4) by mailing the materials to the State Department. *See* U.S. State Department, Bureau of Consular Affairs, *How do I effect service on a foreign state or political subdivision?*, *at* https://travel.state.gov/content/travel/en/legal-considerations/judicial/service-of-process/foreign-sovereign-immunities-act.html (last visited April 10, 2017). The Department of State will ensure "transmission through diplomatic channels to the Ministry of Foreign Affairs of the state concerned." David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 AM. J. INT'L L. 194, 208 (2005).

Early drafts of the VCDR contemplated specifying certain exceptions to inviolability, but

most were ultimately rejected to avoid creating exceptions that might later swallow the rule. *See* Rene Värk, *The Siege of the Estonian Embassy in Moscow: Protection of a Diplomatic Mission and Its Staff in the Receiving State*, XV JURIDICA INT'L 144,146 (2008). Indeed, records from the negotiation show that one delegate withdrew a proposed clarification regarding service once he was satisfied that "it was the unanimous interpretation of the Committee that no writ could be served, even by post, within the premises of a diplomatic mission." United Nations Conference on Diplomatic Intercourse and Immunities, Vienna, Austria, March 2 – April 14, 1961, Vol. I: Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole (1962), U.N. Doc. A.Conf.20/14, at 141.

This understanding that no writ could be served by mail on an embassy was also enacted directly into U.S. law through 28 U.S.C. § 1608(a)(3); *see Autotech Technologies LP* v. *Integral Research & Development Corp.*, 499 F.3d 737, 748-49 (7th Cir. 2007) (rejecting "service through an embassy" as violating both the VCDR and § 1608(a)(3)). In fact, ***Congress changed the nascent Foreign Sovereign Immunities Act "to exclude the possibility" of service by "mail to the head of mission" in response to the State Department's position on that issue.*** Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4th ed. 2016) at 124-25; *see also* Arthur Rovine, *Contemporary Practice of the United States Relating to International Law*, 69 AM. J. INT'L L. 146, 146-47 (1975) (noting State Department position that VCDR signatories "would

have a basis for objection to the propriety of process served in this manner under Article 22"); H.R. Rep. No. 94-1487, at 11, 26 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6609, 6625 ("A second means of [service of process of] questionable validity, involves the mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state. Section 1608 precludes this method so as to avoid questions of inconsistency with section 1 of article 22 of the Vienna Convention on Diplomatic Relations .... **Service on an embassy by mail would be precluded under this bill.**") (emphasis added).

That Congress changed Section 1608 to *eliminate* service of process by mail on an embassy to satisfy the inviolability requirement of Article 22 shows that the Second Circuit went astray when interpreting Section 1608 to *allow* service by mail "via" the embassy.

B. The Second Circuit's Decision Violates Both U.S. Law and the VCDR.

This Court should grant review because the Second Circuit's decision creates a circuit split and stands in direct conflict with the text of the VCDR and 28 U.S.C. § 1608(a)(3).

1. As explained above, inviolability under the VCDR and Section 1608(a) means that foreign missions are absolutely immune from service of process on the sovereign. *Barot* v. *Embassy of the Republic of Zambia*, 785 F.3d 26, 27-30 (D.C. Cir. 2015) (agreeing with district court's rejection of "attempted service at the Embassy in Washington, D.C., rather than at the Ministry of Foreign Affairs in Lusaka, Zambia, as the [Foreign Sovereign

Immunities] Act required"); *Hellenic Lines, Ltd.* v. *Moore*, 345 F.2d 978, 980 (D.C. Cir. 1965) (noting that "the Ambassador's diplomatic immunity would have been violated by any compulsory service of process"). The Second Circuit circumvented this by drawing an artificial distinction between service "on" an embassy and service "via" an embassy. But the facts of this case reveal any such distinction as meaningless. Both the plaintiffs and the district court in the underlying action treated the time of delivery to the embassy, not the time of delivery to the foreign minister's office, as the triggering event for service.

The summons in the underlying case was purportedly delivered to the Sudanese embassy in Washington, D.C. on November 17, 2010. *See* Pet. App. 132a-134a. Plaintiffs moved for entry of default sixty days later, and the district court then entered that default on January 19, 2011—just 63 days after the package allegedly arrived at the embassy. *See* Pet. App. 27a-28a. Section 1608(d) gives a foreign sovereign sixty days to answer—and neither the district court nor Plaintiffs believed that they needed to wait until the embassy even had a chance to send the summons to Sudan and deliver it to the office of the foreign minister. They interpreted the date of receipt from the *embassy* as the applicable proof to satisfy service under Section 1608(c)(2).

The fact that default was sought and received almost exactly 60 days after the package was purportedly delivered to the embassy demonstrates that the "transmittal" of the papers from the embassy to the foreign minister is irrelevant to service in the Second Circuit's eyes. In other words,

if the service is complete upon delivery to the embassy, rather than upon delivery to the foreign minister, then service is not "via" the embassy at all—but "on" the embassy. This result creates a direct split with the other Circuits that have considered the question.

2. The decision below also violates Article 27 of the VCDR by allowing domestic courts to commandeer another sovereign's diplomatic pouch for its own uses. The Second Circuit held that service through an embassy is preferable to the alternatives because "mail addressed to an embassy ... can be forwarded to the minister by diplomatic pouch," comparing diplomatic pouches to "DHL" and other "commercial carrier[s]," and suggesting that each should be equally accessible to an American litigant. Pet. App. 14a. The notion that an American court can dictate the contents of a diplomatic pouch for *mere convenience* of a litigant is repugnant to basic norms of international law.

In contrast to the Second Circuit's decision, Article 27 of the VCDR explicitly states that the "diplomatic bag ... may contain only diplomatic documents or articles intended for official use." *See also Yearbook of the International Law Commission 1958, Vol. II*, U.N. Doc. A/CN.4/SER.A/1958/Add.1 at 97 (emphasizing "the overriding importance which [the Commission] attaches to the observance of the principle of the inviolability of the diplomatic bag"). Litigation documents do not become "diplomatic documents" merely because they have been mailed to an embassy. Diplomatic missions of foreign states cannot be utilized by litigants who do not wish to respect the mission's inviolability or comply with

FSIA requirements and State Department protocols. This Court should accordingly accept review to clarify the interpretation of the FSIA and VCDR that have been cast into doubt by the Second Circuit.

3. The Second Circuit's decision also eliminates the statutory requirement that the clerk of court address and dispatch the documents to the foreign minister. 28 U.S.C. § 1608(a)(3) explicitly requires that service be "***addressed and dispatched*** by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned" (emphasis added). The Second Circuit would allow the court to address and dispatch the process to an embassy, not to the foreign minister—and using the *embassy's* address, not the *minister's* address. The embassy, not the court, would then be expected to ensure that service be "addressed and dispatched" to the head of the ministry of foreign affairs. Relying on the embassy to perform the statutory requirements in its place, a court following the Second Circuit's rule would violate Section 1608(a)(3) and place the United States in breach of its obligations under the VCDR.

4. Finally, the Second Circuit sought to minimize the impact of its ruling by suggesting that a foreign sovereign could reject service of process sent to an embassy, and it faulted Sudan for its failure to do so. This notion emerged as the court denied rehearing, but it imposes an obligation of absolute prescience on an embassy that must now guess what the contents are of each letter sent to it. If it guesses wrong, presumably it does so at its peril. Or perhaps it just rejects all correspondence, rendering it more of a challenge to communicate with the embassy. Even if

it simply rejected all legal communications, this could chill attorney-client discussions (if the person receiving the mail did not appreciate that the correspondence came from the sovereign's counsel). Regardless of how one envisions this working in practice, it places an intolerable burden on embassies and individuals working there, and it finds no mooring in the text of any statute or treaty. This Court should accept *certiorari* to reinforce basic principles of inviolability and uphold the underlying premise of the VCDR.

C. VCDR Signatories, Including The United States, Agree That Inviolability Forbids Service on a State Through an Embassy or Other Mission.

The United States has consistently taken the position in Saudi Arabia and around the world that no service of process on its embassies, bases, training camps, or other facility will be recognized as valid under the VCDR. Like other signatories of the VCDR, the United States insists that service can only be accomplished through diplomatic channels.

For example, a Jordanian national recently brought suit in Riyadh against his employer, the U.S. Military Training Mission in Saudi Arabia ("USMTM"). A summons was served on an employee at USMTM headquarters, but the U.S. embassy responded with the following diplomatic note:

> As the Government of the United States mentioned in Diplomatic Note No. 15-1294 dated August 2, 2015 and Diplomatic Note 15-1506 dated 25 August 2015, under international law,

> before summoning a foreign entity to attend before the courts or any judicial authority in the country in which it is located, official notice of the case must be submitted through diplomatic channels ...
>
> [G]iven that the Notice is an attempt to summon the Government of the United States of America, the Government of the United States of America hereby informs the Ministry of Foreign Affairs that the United States Military Training Mission cannot accept documents with respect to legal action against the Government of the United States of America...
>
> Based on the method of summoning that is in violation of the law, the Government of the United States of America is not a party to this case. Therefore, it will not attend the hearing scheduled for January 4, 2016. The Government of the United States of America will not recognize as valid any award that may be issued against the Government of the United States in this case.

U.S. Diplomatic Note No. 16-0010, dated December 31, 2015 (translated text). As explained in pages 25-26 of the Petition, the United States has consistently taken this position before U.S. and foreign courts.

The Kingdom agrees with the position of the United States, as do most nations. *See* Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4th ed. 2016) at 124 ("The view that service by post on mission premises is prohibited seems to have become generally accepted in practice."); *see, e.g.*, Statement of the Canadian Department of Foreign Affairs,

Trade and Development, *Service of Originating Documents in Judicial and Administrative Proceedings Against the Government of Canada in other States*, Circular Note No. JLA-1446 (Mar. 28, 2014), *available at* www.international.gc.ca/protocol-protocole/policies-politiques/circular-note_note-circulaire_jla-1446.aspx?lang=eng: ("**Service on a diplomatic mission or consular post is therefore invalid, however accomplished** ...") (emphasis in original). The United States risks negative reciprocal action by numerous other foreign states unless this Court intervenes.

D. The Second Circuit's Decision Will Lead To Confusion, Conflict, and Delay.

The Second Circuit's decision also poses practical difficulties. The rule forbidding service on an embassy has roots in historical practice and pragmatism. Simple and direct rules are critical to avoid confusion given the multitude of court systems around the world and to avoid the collision of legal cultures.

Some of the real problems and questions raised by the Second Circuit's decision include when service is complete. Under the Second Circuit's rule, service should not complete until the documents physically arrive at the foreign minister's address (although, as noted above, this rule is contradicted by the court's actual holding). But it is unlikely that the plaintiff or the court could ever learn this date, and thus no one may know when service is complete (perhaps the document sits for days or weeks in the embassy). This will unnecessarily complicate deadlines for a

response and involve problems of proof of receipt. And it will ensure a multitude of disputes over the effective date of service.

Similarly, "service via embassy" would not be reliable as a practical matter. Depending on individual practice, many embassies might simply discard or reject any purportedly "legal" mail as misaddressed. This certainly appears to be the position of the United States. *See, e.g.*, U.S. Diplomatic Note No. 16-0010, dated December 31, 2015. Workers in an embassy mailroom will not know which packages to accept, and may be instructed to reject any package mailed by a lawyer or a court to avoid unintentionally accepting service of process. This would lead to a chilling of important communications between embassies, their own counsel, and lawyers for U.S. foreign nationals.

The Second Circuit's rule also reveals an impossible line drawing problem. If service on (or "via") an embassy is valid, would service on a military or training base, presence post, or delegation suffice? If the ability to transmit documents securely is the key, the United States has thousands of entities that might be forced to dispatch service documents worldwide. Confusion will reign supreme.

That confusion is punctuated by the split between the circuits manifested by the Second Circuit's decision. Having different regional U.S. courts apply fundamentally inconsistent rules for service on foreign embassies will create confusion, lead to misunderstandings, and encourage forum-shopping. *See Barot*, 785 F.3d at 27-30 (rejecting service that

was attempted at an embassy, "rather than at the Ministry of Foreign Affairs in Lusaka, Zambia"); *Magness* v. *Russian Fed.*, 247 F.3d 609, 613 (5th Cir. 2001) (requiring service on the head of Russia's foreign ministry); *Autotech Technologies*, 499 F.3d at 748-49 (rejecting "service through an embassy" as violating both the VCDR and Section 1608(a)(3)).

This Court should resolve this circuit split. Foreign governments rely on the United States federal courts to speak with one voice when it comes to international affairs that affect their interests. *Vimar Seguros Y Reaseguros* v. *M/V Sky Reefer*, 515 U.S. 528, 539 (1995) ("If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements.").

And because Second Circuit law helps determine the inviolability of U.N. missions and the U.N. itself, the present decision is especially disconcerting. Until recently, the Second Circuit agreed with other circuits that "the inviolability principle precludes service of process on a diplomat as agent of a foreign government." *Tachiona* v. *United States*, 386 F.3d 205, 222 (2d Cir. 2004). The circuit's abrupt change of course concerns the Kingdom and all other nations with United Nations missions.

Reflecting VCDR principles, U.N. missions enjoy "immunity from legal process of every kind." Convention on Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15, at art. IV, § 11; *see also* Agreement

Between the United Nations and the United States Regarding the Headquarters of the United Nations ("Headquarters Agreement"), June 26, 1947, 61 Stat. 3416, 11 U.N.T.S. 11, at art. III § 9 (the U.N. "headquarters district shall be inviolable"). Indeed, the United States recently submitted a Statement of Interest that service of process on several foreign states' U.N. missions (as well as the Kingdom's Consulate General in New York) "would violate the United States' obligations" under the VCDR and the Headquarters Agreement. Statement of Interest of the United States at 4, *862 Second Ave. LLC v. 2 Dag Hammarskjold Plaza Condos.*, No. 1:16-cv-08551 (S.D.N.Y. Feb. 17, 2017), ECF No. 76; *see also* Statement of Interest of the United States at 8-9, *Georges v. United Nations*, No. 1:13-cv-07146 (S.D.N.Y. Mar. 7, 2014), ECF No. 21 (asserting that "plaintiffs' attempts to serve the UN ... were ineffective"). In other words, the Second Circuit's interpretation of diplomatic "inviolability" as not forbidding service of process on missions threatens settled law as relied upon by many nations.

The inviolability of foreign missions cannot be diluted by receiving states and their citizens, whether for security or convenience, and the United States has a long history of remaining steadfast to preserve those ancient privileges for ambassadors and embassies. This Court should accept *certiorari* to ensure that the Second Circuit's decision does not strip an important part of the inviolability protections under the VCDR. If the United States allows service of process by mailings to embassies, that practice will inevitably have reciprocal consequences outside the United States, potentially

unraveling the VCDR. The Kingdom respectfully requests that this Court uphold the inviolability of embassies from service of process under the VCDR and 28 U.S.C. § 1608(a)(3).

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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RECORD AND BRIEFS

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No. 16-1094

IN THE

Supreme Court of the United States

REPUBLIC OF SUDAN,

Petitioner,

v.

RICK HARRISON, *ET AL.*,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

THE UNITED ARAB EMIRATES *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The United Arab Emirates is sovereign nation and a primary ally of the United States in the Middle East. It maintains an embassy in Washington, D.C., headed by its ambassador, referred to in diplomatese as the "Ambassador Extraordinary & Plenipotentiary."[2] That embassy houses delegations from several UAE agencies, including (in addition to the Ministry of Foreign Affairs) the Ministry of Defense, the Ministry of Higher Education, the Abu Dhabi Police Department, and others. The UAE also maintains consulates in several U.S. locations (New York, Boston, Los Angeles, and Houston).

The UAE believes the ruling of the Second Circuit panel below creates significant uncertainty on the fundamental question of how service can be accomplished in accord with both the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1602-1611, and the protections of the Vienna Convention on Diplomatic Relations against host-country intrusion on embassies and ambassadors. It also threatens to undermine established procedures used by embassies like the UAE's, and by diplomatic consulates and missions (including the U.N. missions

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[1] Pursuant to Rule 37.6, the Embassy of the UAE certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than this amicus, has made a monetary contribution to the preparation or submission of this brief. Petitioner and Respondents have consented to the filing of this *amicus* brief.

[2] *See* U.S. Department of State Pub. 11211, Diplomatic List (Summer 2016) at 98, www.state.gov/documents/organization/260990.pdf.

of many, if not most, countries), for dealing both with formal service of process and with the persistent flow of other incoming materials.

The UAE has no interest in the underlying substantive claims asserted in the Harrison complaint against Sudan, though (like all members of the Global Counterterrorism Forum, a U.N. coalition of 29 countries, in which the UAE co-chairs the Working Group on Countering Violent Extremism[3]), the UAE continues to support the United States in responding to events like the attack underlying the Harrison complaint.

SUMMARY OF ARGUMENT

The Second Circuit panel's interpretation of the manner by which mail service may be carried out on a foreign government under the FSIA not only conflicts with the established law of at least three other circuits, including the circuit charged by Congress with principal responsibility to oversee actions against foreign nations. It not only contradicts the express obligations of the United States under the Vienna Convention on Diplomatic Relations. It not only fails to conform to the explicit language of the statute requiring that mail service must be "dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned," not to an intermediary connected to the state's foreign ministry. 28 U.S.C. § 1608(a)(3). And it not only ignores the precise changes Congress made during the FSIA legislative history to avoid the very result the panel endorses.

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[3] *See* https://www.thegctf.org/About-us/Structure.

The panel's ruling also threatens to disrupt the routine, regular functions of embassies in Washington, and – if applied to other diplomatic missions, as its logic suggests – the functioning of consulates and other diplomatic offices, including the offices of permanent U.N. representatives that nearly every country maintains within the jurisdiction of the Second Circuit.

Embassies receive mail packages every day – from their own nationals, from other embassies, from the State and Defense Departments and other federal agencies, from U.S. citizens seeking a visa or a meeting, from media outlets, from non-governmental advocacy organizations, from academic researchers. Virtually all embassies in Washington have reinforced perimeters and secured mailrooms in which specialized personnel – trained in security procedures, not diplomacy, and most often not even nationals of the country represented – examine and log incoming packages.

The panel's notion that someone in this secured zone can sign a "return receipt" form and thereby jettison the specific protections of the FSIA and the Vienna Convention is cavalier. So too is its notion that the embassy can adopt a policy of rejecting all incoming mail packages, in order to assure that its security or mail staff does not inadvertently embroil the country in U.S. litigation. And the suggestion that a plaintiff can commandeer the embassy's ambassador or diplomatic pouch to convey a complaint to the defending state's foreign ministry is in fundamental violation of the protections of the Vienna Convention.

U.S. embassies in foreign capitals like Abu Dhabi have even more heavied-up systems for dealing with incoming mail materials, none of which are tuned to screen out local court system complaints that may be in the pile. The U.S. position, consistent with the case law prior to the Second Circuit panel's ruling and with decades of established practice – and articulated forcefully in the United States' amicus briefs below – is that such attempts to accomplish service via an embassy are invalid.

This Court should grant certiorari to reestablish consistency and clarity in the U.S. courts on this important aspect of respect for foreign sovereignty.

ARGUMENT

I. The Statutory Language Plainly Instructs that Service Must Be Made Directly to the Foreign Minister, Not Via the State's Ambassador.

Section 4(a) of the FSIA provides that, where no international convention or special arrangement on service in place, a foreign state may be served "by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed *and dispatched* by the clerk of the court *to the head* of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. § 1608(a)(3) (emphasis added).

The Second Circuit panel opinion curiously italicizes the first half of the action required by the statute – that the service must the "addressed" to the head of the foreign ministry – but not the second half, which mandates that the service be "dispatched ... to"

the foreign minister. Pet. App. 104a. Yet it is the second act – the specified "dispatch" of the complaint – that triggers effective service under the statute.

Under any canon of statutory construction, the plain meaning of "dispatched to" requires that the document be sent directly to the foreign minister at the foreign ministry of the country to be served. The common understanding of the term "dispatch" is "to send someone or something to a place for a particular purpose."[4] One does not "dispatch" a taxi "to" an address by sending it to a different location. Similarly, "dispatch" of a complaint "to the head of the ministry of foreign affairs" is not accomplished by sending it to a stand-in selected for the convenience of the dispatcher. That "[t]he papers were specifically addressed to the Minister of Foreign Affairs via the embassy, and the embassy sent back a return receipt acknowledging receipt of the papers" (Pet. App. 109a) is insufficient, because the papers were not "dispatched to" the foreign minister.

As the petition shows, the FSIA drafters specifically dropped language that would have permitted service by "mail ... to the ambassador or chief of mission of the foreign state," in response to State Department objections. Pet. at 23-24. State proposed and Congress enacted the "dispatch to" formulation to avoid both the legitimate objections raised by other countries that service on an

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[4] Cambridge English Dictionary, http://dictionary.cambridge.org/us/dictionary/english/dispatch; accord, Oxford English Dictionary, https://en.oxforddictionaries.com/definition/dispatch ("send off to a destination or for a purpose").

ambassador would violate the Vienna Convention, and the likelihood that U.S. courts would invalidate service attempts on that basis, generating additional diplomatic tensions over litigation like the case against Sudan here. 71 Dept. of State Bull. 458-59 (1974).

"Congress' intent is found in the words it has chosen to use," *Harbison v. Bell*, 556 U.S. 180, 198 (2009) (Thomas, J., concurring), and the words Congress chose for section 4(a)(3) create a precisely-framed avenue for subjecting a foreign state to the obligation to respond to a court complaint despite its sovereign immunity. The Second Circuit panel here departed from that framework, and from the interpretations of three sister circuits that follow the recognized law on this topic.

II. The Second Circuit Panel's Ruling Will Disrupt the Functioning of Embassies and Diplomatic Missions.

The crux of the panel's ruling on rehearing is that the Sudanese embassy "could have rejected the mailing" but elected not to do so. Pet. App. 101a. In at least two ways, this analysis displays a lack of comprehension of how embassies and diplomatic missions operate – which is perhaps attributable to the lack of a developed record supporting the panel's conclusions[5] – and threatens to disrupt embassies'

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[5] *See* Pet. at 9-10, 13 (package addressed to individual who had ceased to be Sudan's foreign minister six months prior to mailing of service package; return receipt signature illegible; tracking record shows package final destination as two hours' drive from Sudanese embassy, in deep southern Maryland).

core functions of receiving communications related to diplomatic, military, consular, and other matters.

First, the panel's analysis assumes it is permissible and appropriate for Congress to commandeer an embassy's internal and protected processes for communicating with its home country. The panel opinion asserts that "[an] embassy is a logical place to direct a communication intended to reach a foreign country," and appears to regard obligating an ambassador to forward a court document, or to insert a complaint into the diplomatic pouch, as a mere clerical matter. *See* Pet. App. 98a n.3. It is not.

Under the Vienna Convention, on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, an ambassador enjoys full inviolability – in his "person, freedom, and dignity" (art. 29), in his "papers [and] correspondence" (art. 30), from taxation (art. 34), and from legal process (art. 31). His embassy enjoys full inviolability, on which "agents of the receiving state" may not intrude absent his consent. (Art. 22(1), (2).) Its official correspondence – meaning "all correspondence relating to the mission and its functions" – is similarly inviolable. Art. 27(1), (2). Its diplomatic bag cannot be opened or detained. Art. 27(3).

The panel's ruling offends all of these protections. It authorizes the clerk of court, an "agent of the receiving state" (though often acting simply as a forwarding agent for the plaintiff's counsel), to intrude on the embassy's facilities and internal functioning. It mandates the ambassador to play the role of receiving agent for the foreign minister. It presumes to instruct the ambassador to insert the

complaint into the diplomatic pouch, on pain of his country suffering a default judgment if he does not do so.

None of this can be squared with the Vienna Convention's purpose, as stated in its preamble, to "ensure the efficient performance of the functions of diplomatic missions as representing States" or its careful attention to the "freedom [and] dignity" of diplomatic agents and missions. Preamble, art. 29. The panel's constricted reading here is inconsistent with the prior Second Circuit "admonition that the inviolability principle be construed broadly," *Tachiona v. United States*, 386 F.3d 205, 224 (2d Cir. 2004); *767 Third Avenue Associates v. Permanent Mission of Republic of Zaire*, 988 F.2d 295, 298-99 (2d Cir. 1993), as well as *Tachiona*'s recognition that "[i]t is 'essential to ensure inviolability of the person of the ambassador in order to allow him to perform his functions without hindrance from the government of the receiving state, its officials and even private persons.'" *Tachiona*, 386 F.3d at 223 (quoting Sen, *A Diplomat's Handbook of International Law and Practice* 107 (3d ed. 1988)).

Second, the panel's facile conclusion that the signature on the return receipt "surely constituted 'consent'" (Pet. App. 107a) by the Sudanese ambassador to the service dangerously misapprehends the way contemporary embassies function.[6]

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[6] That conclusion concerning "consent" appears only in the panel's opinion denying the rehearing motion, not in the initial panel ruling. Similarly, the panel's suggestion that embassies

Embassies receive mail and hand-delivered packages by the dozens or hundreds daily. Those materials arrive from a variety of sources: visa applications from its nationals; materials from a state on the arrest of a university student the embassy has sponsored; medical and financial records from U.S. hospitals to which the embassy directs patients in need of specialized treatment; documents to renew a lease on consulate space in Chicago; memos from the embassy's legal counsel; and so on. They are essential to the embassy's operations.

Embassy mailrooms, every bit as much as those of today's Congress or of this Court, screen incoming packages. An envelope addressed "c/o Ambassador" does not simply show up in the ambassador's office. The security personnel inspecting incoming packages are not diplomats; in many embassies they are third-country nationals who are trained for security skills, and may or may not have language capability to distinguish U.S. court complaints from dozens of other incoming items. The fact that one of them signs a return receipt is hardly evidence of "consent" or waiver of the embassy's protections under the Vienna Convention. Under that convention, consent can be provided only by "the head of the mission" – *i.e.* by the ambassador him- or herself. Art. 22(1), art. 1(a).

The panel ruling appears to rest on the view that an embassy can simply adopt a policy of refusing to accept registered mail packages at all. Pet. App. 107a. If the only registered mail packages arriving at a busy embassy were court complaints, that view

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can simply reject incoming mail packages, discussed *infra*, appears only in the ruling on rehearing.

might be defensible. But for the occasional U.S.-litigation needle, there is a haystack of other non-litigation material that would be turned away by such a policy.

Not only is there no support in the statutory language for this result. Interpreting the sovereign immunity law to cause this result mocks the inviolability assured to embassies and ambassadors by the Vienna Convention, and imposes burdens on embassy operations that Congress plainly intended to avoid.

CONCLUSION

The Court should grant certiorari and should reverse the Second Circuit ruling, to remove the conflict in interpretation of the service provisions of FSIA §4(a)(3), to uphold U.S. obligations under the Vienna Convention, to protect U.S. diplomatic posts from reciprocal maltreatment in response to the Second Circuit ruling, and to put plaintiffs to the task of serving the foreign minister as specified by the statute.

Respectfully submitted,

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April 10, 2017

No. 16-1094

IN THE

Supreme Court of the United States

REPUBLIC OF SUDAN,

Petitioner,

v.

RICK HARRISON, *et al.*,

Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

JOINT APPENDIX

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U.S. DISTRICT COURT
DISTRICT OF COLUMBIA (WASHINGTON, D.C.)

1:10-cv-01689-RCL

RICK HARRISON *et al.*,
v.
REPUBLIC OF SUDAN,

RELEVANT DOCKET ENTRIES

DATE	NO.	DOCKET TEXT
10/04/2010	1	COMPLAINT against REPUBLIC OF SUDAN (Filing fee $ 350, receipt number 4616033180) filed by DAVID MORALES, MARGARET LOPEZ, GINA MORRIS, SHELLY SONGER, JOHN BUCKLEY, MARTIN SONGER, JR, RICK HARRISON, ANDREW LOPEZ, KESHA STIDHAM, ROBERT MCTUREOUS. (Attachments: # 1 Civil Cover Sheet)(rdj) (Entered: 10/05/2010)
10/04/2010	2	NOTICE OF RELATED CASE by All Plaintiffs. Case related to Cases in the Fourth Circuit Court

DATE	NO.	DOCKET TEXT
		of Appeals. (rdj) (Entered: 10/05/2010)
10/06/2010	3	NOTICE *OFFER TO ARBITRATE* by JOHN BUCKLEY, RICK HARRISON, ANDREW LOPEZ, MARGARET LOPEZ, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, MARTIN SONGER, JR., SHELLY SONGER, KESHA STIDHAM (Jones, Nelson) (Entered: 10/06/2010)
10/08/2010		Summons (1) Issued as to REPUBLIC OF SUDAN. (dr) (Entered: 10/08/2010)
		* * *
10/11/2010	5	NOTICE *OF SUIT* by JOHN BUCKLEY, RICK HARRISON, ANDREW LOPEZ, MARGARET LOPEZ, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, MARTIN SONGER, JR., SHELLY SONGER, KESHA STIDHAM re 2 Notice of Related Case, 4 MOTION to Amend/Correct 1 Complaint, *AMENDED COMPLAINT*, 3 Notice (Other), 1 Complaint, (Jones, Nelson) (Entered: 10/11/2010)

DATE	NO.	DOCKET TEXT
10/11/2010	6	NOTICE *AMENDED OFFER TO ARBITRATE* by JOHN BUCKLEY, RICK HARRISON, ANDREW LOPEZ, MARGARET LOPEZ, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, MARTIN SONGER, JR, SHELLY SONGER, KESHA STIDHAM re 4 MOTION to Amend/Correct 1 Complaint, AMENDED COMPLAINT, 5 Notice (Other), Notice (Other), 1 Complaint, (Jones, Nelson) (Entered: 10/11/2010)
		* * *
10/11/2010	8	AMENDED COMPLAINT against REPUBLIC OF SUDAN filed by GINA MORRIS, JOHN BUCKLEY, RICK HARRISON, DAVID MORALES, MARGARET LOPEZ, SHELLY SONGER, MARTIN SONGER, JR, ANDREW LOPEZ, KESHA STIDHAM, ROBERT MCTUREOUS, EDWARD LOVE, CARL WINGATE, RUBIN SMITH, JEREMY STEWART, LISA LORENSEN, ERIC WILLIAMS, KEITH LORENSEN, AARON TONEY.(znmw,) Modified on 11/5/2010 to edit date filed (dr).

DATE	NO.	DOCKET TEXT
		(Entered: 10/12/2010)
		* * *
10/13/2010		Summons (1) Reissued as to REPUBLIC OF SUDAN. (dr) (Entered: 10/12/2010)
		* * *
11/05/2010	9	AFFIDAVIT REQUESTING FOREIGN MAILING by JOHN BUCKLEY, RICK HARRISON, ANDREW LOPEZ, MARGARET LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARD LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, REPUBLIC OF SUDAN, RUBIN SMITH, MARTIN SONGER, JR, SHELLY SONGER, JEREMY STEWART, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE. (Jones, Nelson) (Entered: 11/05/2010)
11/17/2010	10	CERTIFICATE OF CLERK of mailing one copy of the summons, complaint, and notice of suit, together with a translation of each into the official language of the foreign state on 11/17/2010, by certified mail, return receipt

DATE	NO.	DOCKET TEXT
		requested, to the head of the ministry of foreign affairs, pursuant to 28 U.S.C. 1608(a)(3). (dr) Modified on 11/18/2010 to edit text (dr). (Entered: 11/17/2010)
11/23/2010	11	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed as to REPUBLIC OF SUDAN served on 11/18/2010, answer due 1/17/2011. (dr) (Entered: 11/29/2010)
01/18/2011	12	AFFIDAVIT FOR DEFAULT by JOHN BUCKLEY, RICK HARRISON, ANDREW LOPEZ, MARGARET LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARD LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, RUBIN SMITH, MARTIN SONGER, JR, SHELLY SONGER, JEREMY STEWART, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE (Attachments: # 1 Exhibit Exhibit A-Clerk's Certificate of Mailing, # 2 Exhibit Exhibit B-U.S. Postal Service Return Receipt, # 3 Text of Proposed Order Form of Clerk's

DATE	NO.	DOCKET TEXT
		Entry of Default)(Jones, Nelson) Modified on 1/20/2011 to edit event used (dr). (Entered: 01/18/2011)
01/19/2011	13	Clerk's ENTRY OF DEFAULT as to REPUBLIC OF SUDAN (znmw,) (Entered: 01/19/2011)
02/09/2011	14	MOTION for Default Judgment by JOHN BUCKLEY, RICK HARRISON, ANDREW LOPEZ, MARGARET LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARD LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, RUBIN SMITH, MARTIN SONGER, JR, SHELLY SONGER, JEREMY STEWART, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE (Jones, Nelson) Modified event title on 2/10/2011 (znmw,). (Entered: 02/09/2011)
08/04/2011	15	ORDER setting hearing on plaintiffs' motion for default judgment for September 21, 2011 at 10:00 a.m. in Courtroom 27A. Signed by Judge Henry H. Kennedy, Jr. on August 4, 2011. (lchhk2) (Entered: 08/04/2011)
08/15/2011		Reset Hearings: Motion Hearing

DATE	NO.	DOCKET TEXT
		set for 9/21/2011 @ 10:00 AM in Courtroom 27A before Judge Henry H. Kennedy. (tj) (Entered: 08/15/2011)
		* * *
09/20/2011	26	MOTION to Take Judicial Notice by JOHN BUCKLEY, RICK HARRISON, ANDREW LOPEZ, MARGARET LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARD LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, RUBIN SMITH, MARTIN SONGER, JR, SHELLY SONGER, JEREMY STEWART, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE (Jones, Nelson) (Entered: 09/20/2011)
		* * *
09/21/2011		Minute Entry for proceedings held before Judge Henry H. Kennedy: Motion Hearing held on 9/21/2011. 24 MOTION to Sever Damages Claim of Plaintiff Rubin Smith is hereby GRANTED for reasons stated on the record. Proposed Findings of Fact and Conclusions of Law are due by 10/7/2011.

DATE	NO.	DOCKET TEXT
		(Court Reporter: Annie Shaw.) (tj) (Entered: 09/21/2011)
11/04/2011	28	Case reassigned to Chief Judge Royce C. Lamberth. Judge Henry H. Kennedy no longer assigned to the case. (ds) (Entered: 11/04/2011)
		* * *
02/07/2012	33	Proposed Findings of Fact by JOHN BUCKLEY, RICK HARRISON, ANDREW LOPEZ, MARGARET LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARD LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, MARTIN SONGER, JR, SHELLY SONGER, JEREMY STEWART, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE. (Jones, Nelson) (Entered: 02/07/2012)
		* * *
03/30/2012	40	ORDER AND JUDGMENT granting [#14] plaintiffs' motion for default judgment. Signed by Chief Judge Royce C. Lamberth on March 30, 2012. (lchhk2) Modified on 3/30/2012 (rje,). (Entered: 03/30/2012)

DATE	NO.	DOCKET TEXT
03/30/2012	41	MEMORANDUM OPINION granting 14 plaintiffs' motion for a default judgment signed by Chief Judge Royce C. Lamberth on March 30, 2012.(lchhk2) (Entered: 03/30/2012)
04/19/2012	42	AFFIDAVIT REQUESTING FOREIGN MAILING by JOHN BUCKLEY, RICK HARRISON, ANDREW LOPEZ, MARGARET LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARD LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, RUBIN SMITH, TRACE SMITH, MARTIN SONGER, JR, SHELLY SONGER, JEREMY STEWART, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE. (Jones, Nelson) (Entered: 04/19/2012)
04/19/2012	43	NOTICE *of Default Final Judgment* by JOHN BUCKLEY, RICK HARRISON, ANDREW LOPEZ, MARGARET LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARD LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, RUBIN SMITH, TRACE SMITH,

DATE	NO.	DOCKET TEXT
		MARTIN SONGER, JR, SHELLY SONGER, JEREMY STEWART, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE re 42 Affidavit Requesting Foreign Mailing, (Attachments: # 1 Exhibit A, # 2 Exhibit A (Arabic Translation), # 3 Exhibit B, # 4 Exhibit B (Arabic Translation), # 5 Exhibit Copy of Foreign Sovereign Immunities Act, # 6 Exhibit Arabic Translation of Notice of Default Final Judgment)(Jones, Nelson) (Entered: 04/19/2012)
04/20/2012	44	REQUEST from ALL PLAINTIFFS for the Clerk to effect service of one copy of the 43 NOTICE of Default Final Judgment, 41 MEMORANDUM OPINION, and 40 ORDER AND JUDGMENT, together with a translation of each into the official language of the foreign state, by certified mail, return receipt requested, to the head of the ministry of foreign affairs, pursuant to 28 U.S.C. 1608(a)(3). (See docket entry 42 to view document)(rdj) (Entered: 04/20/2012)

DATE	NO.	DOCKET TEXT
04/20/2012	45	CERTIFICATE OF CLERK of mailing one copy of the 43 NOTICE of Default Final Judgment, 41 MEMORANDUM OPINION, and 40 ORDER AND JUDGMENT, together with a translation of each into the official language of the foreign state on 4/20/2012, by certified mail, return receipt requested, to the head of the ministry of foreign affairs, pursuant to 28 U.S.C. 1608(a)(3). (Attachments: # 1 Exhibit) (rdj) (Entered: 04/20/2012)
08/13/2012	46	Unopposed MOTION for Protective Order authorizing disclosure in response to Rule 45 subpoena by U.S. DEPARTMENT OF THE TREASURY OFFICE OF FOREIGN ASSETS CONTROL (Attachments: # 1 Exhibit A - Subpoena, # 2 Text of Proposed Order)(jf,) (Entered: 08/14/2012)
08/15/2012	47	ORDER granting 46 Motion for Protective Order. Signed by Chief Judge Royce C. Lamberth on 8/15/12. (rje) (Entered: 08/15/2012)
05/29/2013	48	MOTION Order Finding Sufficient Time Has Passed To Seek Attachment re 40 Memorandum &

DATE	NO.	DOCKET TEXT
		Opinion by JOHN BUCKLEY, RICK HARRISON, ANDREW LOPEZ, MARGARET LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARD LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, RUBIN SMITH, TRACE SMITH, MARTIN SONGER, JR, SHELLY SONGER, JEREMY STEWART, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE (Attachments: # 1 Exhibit Order and Judgment, # 2 Exhibit Memorandum Opinion, # 3 Exhibit Civil Docket, # 4 Exhibit USPS Confirmation, # 5 Text of Proposed Order)(Jones, Nelson) (Entered: 05/29/2013)
06/28/2013	49	ORDER granting 48 Motion for an Order pursuant to 28 U.S.C. 1610(c). Signed by Chief Judge Royce C. Lamberth on June 28, 2013. (lcrcl5) (Entered: 06/28/2013)
05/07/2015	50	TRANSCRIPT OF PROCEEDINGS before Judge Henry H. Kennedy held on 9-21-11; Page Numbers: 1-35. Date of Issuance:5-7-15. Court Reporter/Transcriber Barbara J. DeVico, Telephone number

DATE	NO.	DOCKET TEXT
		2023543118, Court Reporter Email Address : Barbara_DeVico @dcd.uscourts.gov.<P></P>For the first 90 days after this filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the court reporter referenced above. After 90 days, the transcript may be accessed via PACER. Other transcript formats, (multi-page, condensed or PDF) may be purchased from the court reporter. <P>NOTICE RE REDACTION OF TRANSCRIPTS: The parties have twenty-one days to file with the court and the court reporter any request to redact personal identifiers from this transcript. If no such requests are filed, the transcript will be made available to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at www.dcd.uscourts.gov.<P></P> Redaction Request due 5/28/2015. Redacted Transcript Deadline set for 6/7/2015. Release of Transcript Restriction set for 8/5/2015.(DeVico, Barbara)

DATE	NO.	DOCKET TEXT
		(Entered: 05/07/2015)
05/12/2015	51	TRANSCRIPT OF PROCEEDINGS before Judge Henry H. Kennedy held on 9-21-11; Page Numbers: 1-35. Date of Issuance:5-12-15. Court Reporter/Transcriber Barbara DeVico, Telephone number (202)354-3118, Court Reporter Email Address : Barbara_DeVico@dcd.uscourts.gov. For the first 90 days after this filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the court reporter referenced above. After 90 days, the transcript may be accessed via PACER. Other transcript formats, (multi-page, condensed or PDF) may be purchased from the court reporter. **NOTICE RE REDACTION OF TRANSCRIPTS**: The parties have twenty-one days to file with the court and the court reporter any request to redact personal identifiers from this transcript. If no such requests are filed, the transcript will be made available

DATE	NO.	DOCKET TEXT
		to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at www.dcd.uscourts.gov. Redaction Request due 6/2/2015. Redacted Transcript Deadline set for 6/12/2015. Release of Transcript Restriction set for 8/10/2015.(DeVico, Barbara) (Entered: 05/12/2015)
06/14/2015	52	NOTICE of Appearance by Christopher M. Curran on behalf of REPUBLIC OF SUDAN (Curran, Christopher) (Entered: 06/14/2015)
06/14/2015	53	NOTICE of Appearance by Nicole Erb on behalf of REPUBLIC OF SUDAN (Erb, Nicole) (Entered: 06/14/2015)
06/14/2015	54	NOTICE of Appearance by Claire Angela Delelle on behalf of REPUBLIC OF SUDAN (Delelle, Claire) (Entered: 06/14/2015)
06/14/2015	55	MOTION to Vacate 40 Memorandum & Opinion by REPUBLIC OF SUDAN (Attachments: # 1 Memorandum in

DATE	NO.	DOCKET TEXT
		Support, # 2 Declaration of Maowia O. Khalid in Support of Motion, # 3 Text of Proposed Order)(Curran, Christopher) (Entered: 06/14/2015)
06/26/2015	56	Unopposed MOTION for Extension of Time to File Response/Reply *to Defendant's Motion to Vacate Default Judgment Pursuant to Rule 60(b)* by JOHN BUCKLEY, RICK HARRISON, ANDREW LOPEZ, MARGARET LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARD LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, RUBIN SMITH, TRACE SMITH, MARTIN SONGER, JR, SHELLY SONGER, JEREMY STEWART, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE (Attachments: # 1 Text of Proposed Order)(Jones, Nelson) (Entered: 06/26/2015)
07/13/2015	57	Memorandum in opposition to re 55 MOTION to Vacate 40 Memorandum & Opinion filed by JOHN BUCKLEY, RICK HARRISON, ANDREW LOPEZ, MARGARET LOPEZ, KEITH

DATE	NO.	DOCKET TEXT
		LORENSEN, LISA LORENSEN, EDWARD LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, RUBIN SMITH, TRACE SMITH, MARTIN SONGER, JR, SHELLY SONGER, JEREMY STEWART, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE. (Jones, Nelson) (Entered: 07/13/2015)
07/17/2015	58	ORDER granting 56 Motion for Extension of Time to File Response/Reply re 55 MOTION to Vacate 40 Memorandum & Opinion ; Set/Reset Deadlines: Responses due by 7/13/2015 Replies due by 7/31/2015. Signed by Judge Royce C. Lamberth on July 17, 2015. (lcrcl1) (Entered: 07/17/2015)
07/31/2015	59	REPLY to opposition to motion re 55 MOTION to Vacate 40 Memorandum & Opinion filed by REPUBLIC OF SUDAN. (Curran, Christopher) (Entered: 07/31/2015)
08/28/2015	60	MOTION to Strike 55 MOTION to Vacate 40 Memorandum & Opinion *as to Declaration of Ambassador Maowia O. Khalid*

DATE	NO.	DOCKET TEXT
		[55-2] in support thereof by JOHN BUCKLEY, RICK HARRISON, ANDREW LOPEZ, MARGARET LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARD LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, RUBIN SMITH, TRACE SMITH, MARTIN SONGER, JR, SHELLY SONGER, JEREMY STEWART, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE (Attachments: # 1 Declaration of Roarke Maxwell, Esq., # 2 Memorandum in Support, # 3 Text of Proposed Order)(Jones, Nelson) (Entered: 08/28/2015)
09/14/2015	61	Memorandum in opposition to re 60 MOTION to Strike 55 MOTION to Vacate 40 Memorandum & Opinion *as to Declaration of Ambassador Maowia O. Khalid [55-2] in support thereof* filed by REPUBLIC OF SUDAN. (Attachments: # 1 Declaration of Claire A. DeLelle, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5, # 7 Exhibit 6, # 8 Text of Proposed Order)(Curran, Christopher)

DATE	NO.	DOCKET TEXT
		(Entered: 09/14/2015)
10/12/2015	62	NOTICE OF SUPPLEMENTAL AUTHORITY by JOHN BUCKLEY, RICK HARRISON, ANDREW LOPEZ, MARGARET LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARD LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, TRACE SMITH, MARTIN SONGER, JR, SHELLY SONGER, JEREMY STEWART, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE (Attachments: # 1 Exhibit A)(Jones, Nelson) (Entered: 10/12/2015)
11/06/2015	63	NOTICE OF SUPPLEMENTAL AUTHORITY by REPUBLIC OF SUDAN (Attachments: # 1 Supplemental Authority)(Curran, Christopher) (Entered: 11/06/2015)
12/22/2015	64	NOTICE OF SUPPLEMENTAL AUTHORITY by REPUBLIC OF SUDAN (Attachments: # 1 Exhibit Supplemental Authority 1, # 2 Exhibit Supplemental Authority 2)(Curran, Christopher) (Entered: 12/22/2015)
02/22/2016	65	NOTICE OF SUPPLEMENTAL

DATE	NO.	DOCKET TEXT
		AUTHORITY by REPUBLIC OF SUDAN (Attachments: # 1 Exhibit A)(Curran, Christopher) (Entered: 02/22/2016)
09/26/2016	66	NOTICE OF SUPPLEMENTAL AUTHORITY by REPUBLIC OF SUDAN (Attachments: # 1 Exhibit A)(Curran, Christopher) (Entered: 09/26/2016)
08/23/2017	67	NOTICE OF SUPPLEMENTAL AUTHORITY by REPUBLIC OF SUDAN (Attachments: # 1 Exhibit A)(Curran, Christopher) (Entered: 08/23/2017)
11/16/2017	68	NOTICE OF SUPPLEMENTAL AUTHORITY by REPUBLIC OF SUDAN (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J)(Curran, Christopher) (Entered: 11/16/2017)

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(FOLEY SQUARE)

1:13-cv-03127-PKC

RICK HARRISON *et al.*,

v.

THE REPUBLIC OF SUDAN *et al.*,

RELEVANT DOCKET ENTRIES

DATE	NO.	DOCKET TEXT
05/09/2013	1	NOTICE of Pending Action-Lis Pendens. Document filed by John Buckley III, Rick Harrison, Andy Lopez, Margaret Lopez, Keith Lorensen, Lisa Lorensen, Edward Love, Robert McTureous, David Morales, Gina Morris, Tracey Smith, Shelly Songer, Martin Songer, Jr., Jeremy Stewart, Kesha Stidham, Aaron Toney, Eric Williams, Carl Wingate. (join) Modified on 5/13/2013 (join). (jd). (Entered: 05/13/2013)

DATE	NO.	DOCKET TEXT
05/09/2013		SUMMONS ISSUED as to The Republic of Sudan. (jom) (Entered: 05/13/2013)
		* * *
05/31/2013	3	MOTION for Attachment *Motion for Entry of Order Finding Sufficient Time Has Passed to Seek Attachment and Execution of Defendant/Judgment Debtor's Assets.* Document filed by John Buckley III, Rick Harrison, Andy Lopez, Margaret Lopez, Keith Lorensen, Lisa Lorensen, Edward Love, Robert McTureous, David Morales, Gina Morris, Tracey Smith, Shelly Songer, Martin Songer, Jr., Jeremy Stewart, Kesha Stidham, Aaron Toney, Eric Williams, Carl Wingate. (Attachemnts: # 1 Test of Proposed Order, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D)(Rosenthal, Edward) (Entered: 5/31/2013)
		* * *
09/20/2013	5	ORDER GRANTING MOTION FOR ENTRY OF ORDER FINDING SUFFICIENT TIME HAS PASSED TO SEEK

DATE	NO.	DOCKET TEXT
		ATTACHMENT AND EXECUTION AND AUTHORIZING ATTACHMENT OF DEFENDANTS/JUDGMENT-DEBTORS' ASSETS WITHIN THIS JURISDICTION PURSUANT TO 28 U.S.C. . § 1610(c): granting 3 Motion to Attach. The Motion is GRANTED. The Court hereby concludes that, under 28 U.S.C. 1610(c), all conditions precedent to the Plaintiffs' request to attach and execute against blocked assets of the Defendant/Judgment Debtor, Republic of Sudan, have been met, including providing proper notification of the default judgment to the Defendant/Judgment Debtor, pursuant to 28 U.S.C. § 1608(e), and that, for the purposes of attachment and execution, a reasonable period of time has elapsed following the entry of judgment and the giving of notice to the Defendant/Judgment Debtor. The Plaintiffs are hereby authorized to seek attachment of

DATE	NO.	DOCKET TEXT
		frozen assets located within this jurisdiction using post judgment enforcement procedures. (Signed by Judge Analisa Torres on 9/20/2013) (ama) (Entered: 09/20/2013)
10/21/2013	6	NOTICE of Petition; Petition for Turnover Order Against National Bank of Egypt Pursuant to 28 U.S.C. Sect. 1610(g), CPLR Sect. 5225(b) and Federal Rule of Civil Procedure Rule 69(a). Document filed by John Buckley III, Rick Harrison, Andy Lopez, Margaret Lopez, Keith Lorensen, Lisa Lorensen, Edward Love, Robert McTureous, David Morales, Gina Morris, Tracey Smith, Shelly Songer, Martin Songer, Jr., Jeremy Stewart, Kesha Stidham, Aaron Toney, Eric Williams, Carl Wingate. (Attachments: # 1 Exhibit A (redacted), # 2 Exhibit B (redacted), # 3 Exhibit C (redacted), # 4 Exhibit D (redacted), # 5 Exhibit E (redacted), # 6 Text of Proposed Order (redacted))(Rosenthal, Edward) (Entered: 10/21/2013)

DATE	NO.	DOCKET TEXT
		* * *
10/23/2013	8	TURNOVER ORDER: AND NOW, this 23rd day of October, 2013, upon Plaintiffs' Petition for Turnover Order Against National Bank of Egypt Pursuant to 28 U.S.C. § 1610(g), CPLR § 5225(b) and Federal Rule of Civil Procedure 69(a), the Motion is GRANTED. The Court hereby finds and orders as follows: Plaintiffs obtained a judgment in the District Court for the District of Columbia in the amount of $314,705,896, plus interest (the "Judgment"), and the entire principal amount of the Judgment remains unsatisfied. Funds held at the National Bank of Egypt, New York Branch, are subject to execution and attachment under the Foreign Sovereign Immunities Act because the owner of the funds, is an agency and instrumentality of the Republic of Sudan. National Bank of Egypt owned by totaling plus accrued interest, is subject to execution to satisfy the Plaintiffs' outstanding judgment.

DATE	NO.	DOCKET TEXT
		The Court hereby directs National Bank of Egypt to turn over the proceeds of totaling together with any accrued interest, to the Plaintiffs within ten (10) days from the date of this Order. An OFAC license is not necessary to disburse these funds and no notice is necessary to. See Heiser v. Bank of Tokyo Mitsubishi UFJ, New York Branch, 919 F. Supp. 2d 411, 422 (S.D.N.Y. 2013); Heiser v. Islamic Republic of Iran, 807 F. Supp. 2d 9, 23 (D.D.C. 2011); Weininger v. Castro, 432 F. Supp. 2d 457 (S.D.N.Y. 2006). This Order enforces a duly registered District Court judgment from the District of Columbia, recognized by a New York Federal Court and given full faith and credit by this Court. (Signed by Judge Analisa Torres on 10/23/2013) (rsh) (Entered: 10/23/2013)
10/28/2013	9	NOTICE of Petition; Petition for Turnover Order Against BNP Paribas Pursuant to 28 U.S.C. Sect. 1610(g), CPLR Sect. 5225(b) and Federal Rule of Civil

DATE	NO.	DOCKET TEXT
		Procedure Rule 69(a). Document filed by John Buckley III, Rick Harrison, Andy Lopez, Margaret Lopez, Keith Lorensen, Lisa Lorensen, Edward Love, Robert McTureous, David Morales, Gina Morris, Tracey Smith, Shelly Songer, Martin Songer, Jr., Jeremy Stewart, Kesha Stidham, Aaron Toney, Eric Williams, Carl Wingate. (Attachments: # 1 Exhibit A (redacted), # 2 Exhibit B (redacted), # 3 Exhibit C (redacted), # 4 Exhibit D (redacted), # 5 Exhibit E (redacted), # 6 Exhibit F (redacted), # 7 Exhibit G (redacted), # 8 Exhibit H (redacted), # 9 Exhibit I (redacted), # 10 Exhibit J (redacted), # 11 Exhibit K (redacted), # 12 Text of Proposed Order (redacted))(Rosenthal, Edward) (Entered: 10/28/2013)
		* * *
11/04/2013	11	TURNOVER ORDER AGAINST BNP PARIBAS: AND NOW, this 4th day of November, 2013, upon Plaintiffs' Petition for Turnover Order Against BNP Paribas

DATE	NO.	DOCKET TEXT
		Pursuant to 28 U.S.C. 1610(g), CPLR 5225(b) and Federal Rule of Civil Procedure 69(a), the Motion is GRANTED. The Court hereby finds and orders as follows: Plaintiffs obtained a judgment in the District Court for the District of Columbia in the amount of $314,705,896, plus interest (the "Judgment"), and the entire principal amount of the Judgment remains unsatisfied. Funds held at BNP Paribas are subject to execution and attachment under the Foreign Sovereign Immunities Act because the owners of the funds are agencies and instrumentalities of the Republic of Sudan. Also known as, is an agency and instrumentality of the Sudanese government. The following accounts, totaling plus accrued interest, are subject to execution to satisfy the Plaintiffs' outstanding judgment. The Court hereby directs BNP Paribas to turn over the proceeds of foregoing accounts, totaling, together with any accrued interest, to the Plaintiffs within ten (10) days from the

DATE	NO.	DOCKET TEXT
		date of this Order. An OFAC license is not necessary to disburse these funds and no notice is necessary to the Sudanese agencies and instrumentalities. See Heiser v. Bank of Tokyo Mitsubishi UFJ, New York Branch, 919 F. Supp. 2d 411, 422 (S.D.N.Y. 2013); Heiser v. Islamic Republic of Iran, 807 F. Supp. 2d 9, 23 (D.D.C. 2011); Weininger v. Castro, 432 F. Supp. 2d 457 (S.D.N.Y. 2006). This Order enforces a duly registered District Court judgment from the District of Columbia, recognized by a New York Federal Court and given full faith and credit by this Court. (Signed by Judge Analisa Torres on 11/4/2013) (rsh) (Entered: 11/04/2013)
11/04/2013	12	CONSENT MOTION to Stay re: 8 Order ,,,,,, *Uncontested Motion for Order Providing a Limited Stay of Enforcement of Turnover Order and Providing Notice to Third Parties of Turnover Order.* Document filed by John Buckley III, Rick Harrison, Andy Lopez,

DATE	NO.	DOCKET TEXT
		Margaret Lopez, Keith Lorensen, Lisa Lorensen, Edward Love, Robert McTureous, David Morales, Gina Morris, Tracey Smith, Shelly Songer, Martin Songer, Jr., Jeremy Stewart, Kesha Stidham, Aaron Toney, Eric Williams, Carl Wingate. (Attachments: # 1 Text of Proposed Order)(Levitt, Brandon) (Entered: 11/04/2013)
11/12/2013	13	MOTION to Amend/Correct 11 Order,,,,,, *Unopposed Motion for Order Amending Turnover Order Against BNP Paribas (redacted).* Document filed by John Buckley III, Rick Harrison, Andy Lopez, Margaret Lopez, Keith Lorensen, Lisa Lorensen, Edward Love, Robert McTureous, David Morales, Gina Morris, Tracey Smith, Shelly Songer, Martin Songer, Jr., Jeremy Stewart, Kesha Stidham, Aaron Toney, Eric Williams, Carl Wingate. (Attachments: # 1 Exhibit A (redacted))(Rosenthal, Edward) (Entered: 11/12/2013)

* * *

DATE	NO.	DOCKET TEXT
11/13/2013	15	ORDER PROVIDING A LIMITED STAY OF ENFORCEMENT OF TURNOVER ORDER AND PROVIDING NOTICE TO THIRD PARTIES OF TURNOVER ORDER granting 12 Motion to Stay. NOW, THEREFORE, it is hereby ORDERED as follows: The Garnishee, at its sole expense, shall serve the Third Parties with the Turnover Petition and Turnover Order in the manner specified in subsequent provisions of this Order, except that any exhibits to the Turnover Petition that have been filed under seal shall be omitted and replaced by a list of the Blocked Assets pertinent to the Third Party to be served as further set forth within this order. (Signed by Judge Analisa Torres on 11/12/2013) (rsh) (Entered: 11/14/2013)
		* * *
12/11/2013	18	NOTICE of Petition; Petition for Mashreqbank Pursuant to 28 U.S.C. Sect. 1610(g), CPLR Sect. 5225(b) and F.R.C.P. 69(a).

DATE	NO.	DOCKET TEXT
		Document filed by John Buckley III, Rick Harrison, Andy Lopez, Margaret Lopez, Keith Lorensen, Lisa Lorensen, Edward Love, Robert McTureous, David Morales, Gina Morris, Tracey Smith, Shelly Songer, Martin Songer, Jr., Jeremy Stewart, Kesha Stidham, EricWilliams, Carl Wingate. (Attachments: # 1 Exhibit A (redacted), # 2 Exhibit B (redacted), # 3 Exhibit C (redacted), # 4 Exhibit D (redacted), # 5 Exhibit E (redacted), # 6 Exhibit F (redacted), # 7 Exhibit G (redacted), # 8 Exhibit H (redacted), # 9 Exhibit I (redacted), # 10 Text of Proposed Order (redacted))(Goldman, Beth) (Entered: 12/11/2013)
		* * *
12/12/2013	20	TURNOVER ORDER AGAINST MASHREQBANK: AND NOW, this 12th day of December, 2013, upon Plaintiffs' Petition for Turnover Order Against Mashreqbank pursuant to 28 U.S.C. § 1610(g), CPLR § 5225(b) and Federal Rule of Civil

DATE	NO.	DOCKET TEXT
		Procedure 69(a), the Motion is GRANTED. The Court hereby finds and orders as follows: Plaintiffs obtained a judgment in the District Court for the District of Columbia in the amount of $314,705,896, plus interest (the "Judgment"), and the entire principal amount of the Judgment remains unsatisfied. Funds held at Mashreqbank are subject to execution and attachment under the Foreign Sovereign Immunities Act because the owners of the funds are agencies and instrumentalities of the Republic of Sudan. Also known as an agency and instrumentality of the Sudanese government. The following account, totaling plus accrued interest, is subject to execution to satisfy the Plaintiffs' outstanding judgment. The Court hereby directs Mashreqbank to tum over the proceeds of the foregoing accounts, totaling (the "Turnover Assets"), together with any accrued interest, to the Plaintiffs within ten (10) days from the

DATE	NO.	DOCKET TEXT
		date of this Order. An OF AC license is not necessary to disburse these funds and no notice is necessary to the Sudanese agencies and instrumentalities. See Heiser v. Bank of Tokyo Mitsubishi UFJ, New York Branch, 919 F. Supp. 2d 411, 422 (S.D.N.Y. 2013); Heiser v. Islamic Republic of Iran, 807 F. Supp. 2d 9, 23 (D.D.C. 2011); Weininger v. Castro, 432 F. Supp. 2d 457 (S.D.N.Y. 2006). Upon turnover by Mashreqbank of the Turnover Assets to the Plaintiffs, plus all accrued interest thereon to date, Mashreqbank shall be fully discharged pursuant to CPLR § § 5209 or 6204 and Rule 22 of the Federal Rules of Civil Procedure, as applicable, and released from any and all liability and obligations or other liabilities, including all writs of execution, notices of pending action, restraining notices and other judgment creditor process of any kind, whether served on, or delivered to Mashreqbank, to the extent that they apply, purport to apply or attach to the

DATE	NO.	DOCKET TEXT
		Turnover Assets, to defendant Sudan, and to any agency and instrumentality of Sudan, or to any other party otherwise entitled to claim the Turnover Assets (in whole or in part), including without limitation, the plaintiffs in Owens, et al. v. Republic of Sudan, et al., 1:01-cv-02244-JDB (D.D.C.), and any other persons or entities, to the full extent of such amounts so held and deposited in compliance with this partial judgment. Mashreqbank shall provide a copy of this order to counsel for Owens within 5 days of the date of this order. Upon payment and turnover by Mashreqbank of the Turnover Assets to the Plaintiffs, plus all accrued interest thereon to date, all other persons and entities shall be permanently restrained and enjoined from instituting or prosecuting any claim, or pursuing any action against Mashreqbank in any jurisdiction or tribunal arising from or relating to any claim (whether legal or equitable) to the funds turned over in compliance with

DATE	NO.	DOCKET TEXT
		paragraph 7 of this Order. This Order enforces a duly registered District Court judgment from the District of Columbia, recognized by a New York Federal Court and given full faith and credit by this Court. (Signed by Judge Analisa Torres on 12/12/2013) (rsh) (Entered: 12/12/2013)
12/13/2013	21	AMENDED TURNOVER ORDER AGAINST BNP PARIBAS REDACTED PURSUANT TO PROTECTIVE ORDER granting 13 Motion to Amend/Correct. AND NOW, this 13th day of December, 2013, upon Plaintiffs' Petition for Turnover Order Against BNP Paribas pursuant to 28 U.S.C. § 1610(g), CPLR § 5225(b) and Federal Rule of Civil Procedure 69(a), and Plaintiffs' Unopposed Motion for Order Amending Turnover Order Against BNP Paribas, the Motion is GRANTED. The Court hereby finds and orders as follows: Plaintiffs obtained a judgment in the District Court for the District of Columbia in the

DATE	NO.	DOCKET TEXT
		amount of $314,705,896, plus interest (the "Judgment"), and the entire principal amount of the Judgment remains unsatisfied. Funds held at BNP Paribas New York Branch are subject to execution and attachment under the Foreign Sovereign Immunities Act because the owners of the funds are agencies and instrumentalities of the Republic of Sudan. Also known as is an agency and instrumentality of the Sudanese government. The following accounts, totaling plus accrued interest, are subject to execution to satisfy the Plaintiffs' outstanding judgment. Sudan is an agency and instrumentality of the Sudanese government. The Court hereby directs BNP Paribas to turn over the proceeds of the foregoing accounts, totaling (the "Turnover Assets"), together with any accrued interest, to the Plaintiffs within ten (10) days from the date of this Order. An OFAC license is not necessary to disburse these funds and no notice is necessary to the

DATE	NO.	DOCKET TEXT
		Sudanese agencies and instrumentalities. See Heiser v. Bank of Tokyo Mitsubishi UFJ, New York Branch, 919 F. Supp. 2d 411,422 (S.D.N.Y. 2013); Heiser v. Islamic Republic of Iran, 807 F. Supp. 2d 9, 23 (D.D.C. 2011); Weininger v. Castro, 432 F. Supp. 2d 457 (S.D.N.Y. 2006). Upon turnover by BNP Paribas of the Turnover Assets to the Plaintiffs, plus all accrued interest thereon to date, BNP Paribas shall be fully discharged pursuant to CPLR § § 5209 or 6204 and Rule 22 of the Federal Rules of Civil Procedure, as applicable, and released from any and all liability and obligations or other liabilities, including all writs of execution, notices of pending action, restraining notices and other judgment creditor process of any kind, whether served on, or delivered to BNP Paribas, to the extent that they apply, purport to apply or attach to the Turnover Assets, to defendant Sudan, and to any agency and instrumentality of Sudan, or to any other party otherwise

DATE	NO.	DOCKET TEXT
		entitled to claim the Turnover Assets (in whole or in part), including without limitation, the plaintiffs in Owens, et al. v. Republic of Sudan, et al., 1:01-cv-02244-JDB (D.D.C.), and any other persons or entities, to the full extent of such amounts so held and deposited in compliance with this partial judgment. BNP Paribas shall provide a copy of this order to counsel for Owens within 5 days of the date of this order. Upon payment and turnover by BNP Paribas of the Turnover Assets to the Plaintiffs, plus all accrued interest thereon to date, all other persons and entities shall be permanently restrained and enjoined from instituting or prosecuting any claim, or pursuing any action against BNP Paribas in any jurisdiction or tribunal arising from or relating to any claim (whether legal or equitable) to the funds turned over in compliance with paragraph 9 of this Order. This Order enforces a duly registered District Court judgment from the District of Columbia,

DATE	NO.	DOCKET TEXT
		recognized by a New York Federal Court and given full faith and credit by this Court. This Order supersedes any prior order relating to the Turnover Assets described in this Order. (Signed by Judge Analisa Torres on 12/13/2013) (rsh). (Entered: 12/13/2013)
12/16/2013	22	THIRD PARTY RESPONSE *by Defendant to Third-Party Notice and Withdrawal of Lien.* Document filed by Rick Harrison. (Attachments: # 1 Exhibit Exhibit A, # 2 Exhibit Exhibit B-Part1, # 3 Exhibit Exhibit B-Part2, # 4 Exhibit Exhibit B-Part3, # 5 Exhibit Exhibit C, # 6 Exhibit Exhibit D)(Kaplan, Annie) (Entered: 12/16/2013)
12/18/2013	23	NOTICE of Petition; Petition for Turnover Order Against Credit Agricole Pursuant to 28 U.S.C. Sect. 1610(g), CPLR Sect. 5225(b) and Federal Rule of Civil Procedure Rule 69(a). Document filed by John Buckley III, Rick Harrison, Margaret Lopez, Keith Lorensen, Lisa Lorensen, Edward Love, Robert

DATE	NO.	DOCKET TEXT
		McTureous, David Morales, Gina Morris, Tracey Smith, Shelly Songer, Martin Songer, Jr., Jeremy Stewart, Kesha Stidham, Eric Williams, Carl Wingate. (Attachments: # 1 Exhibit A (redacted), # 2 Exhibit B (redacted), # 3 Exhibit C (redacted), # 4 Exhibit D (redacted), # 5 Exhibit E (redacted), # 6 Exhibit F (redacted), # 7 Exhibit G (redacted), # 8 Exhibit H (redacted), # 9 Text of Proposed Order (redacted))(Rosenthal, Edward) (Entered: 12/18/2013)
		* * *
12/19/2013	27	RESPONSE re: 23 Notice (Other), Notice (Other), Notice (Other) / *[REDACTED] Responses and Objections of Credit Agricole Corporate and Investment Bank to Plaintiffs' Petition for Turnover Order, dated December 19, 2013.* Document filed by Credit Agricole Corporate and Investment Bank. (Boccuzzi, Carmine) (Entered: 12/19/2013)
		* * *

DATE	NO.	DOCKET TEXT
01/02/2014	29	REPLY re: 23 Notice (Other), Notice (Other), Notice (Other). Document filed by John Buckley III, Rick Harrison, Andy Lopez, Margaret Lopez, Keith Lorensen, Lisa Lorensen, Edward Love, Robert McTureous, David Morales, Gina Morris, Tracey Smith, Shelly Songer, Martin Songer, Jr., Jeremy Stewart, Kesha Stidham, Aaron Toney, Eric Williams, Carl Wingate. (Attachments: # 1 Exhibit A (redacted))(Rosenthal, Edward) (Entered: 01/02/2014)
		* * *
01/06/2014	31	TURNOVER ORDER: that the Petition is GRANTED. The Court finds that the Turnover Assets are subject to turnover pursuant to § 201 of the Terrorism Risk Insurance Act of 2002 and are subject to execution and attachment under the Foreign Sovereign Immunities Act because the owners of the funds are agencies and instrumentalities of the Republic of Sudan. Upon turnover by CA-CIB of the funds

DATE	NO.	DOCKET TEXT
		identified herein to the Plaintiffs, plus all accrued interest thereon to date, Credit Agricole shall be fully discharged pursuant to CPLR §§ 5209 or 6204 and Rule 22 of the Federal Rules of Civil Procedure, as applicable, and released from any and all liability and obligations or other liabilities in connection with the turnover of those funds, including all writs of execution, notices of pending action, restraining notices and other judgment creditor process of any kind, whether served on, or delivered to CA-CIB, to the extent that they apply, purport to apply or attach to the Turnover Assets, to defendant The Republic of Sudan, and to any agency and instrumentality of The Republic of Sudan, or to any other party otherwise entitled to claim the Turnover Assets (in whole or in part), and any other persons or entities, to the full extent of such amounts so held and deposited in compliance with this Judgment, and as further set forth in this Order. Notwithstanding

DATE	NO.	DOCKET TEXT
		anything in this Order to the contrary, Plaintiffs reserve all rights to seek turnover of other amounts blocked by CA-CIB pursuant to regulations promulgated by OFAC, which CA-CIB will continue to restrain, as further set forth in this Order. Plaintiffs and CA-CIB shall meet and confer as to these amounts following the issuance by the Second Circuit of its rulings in Calderon-Cardona v. JP Morgan Chase Bank, N.A., No. 12-75 (2d Cir), and Hausler v. JPMorgan Chase, N.A., Nos. 12-1264 & 12-1272 (2d Cir.). This Order enforces a duly registered District Court judgment from the District of Columbia, recognized by a New York Federal Court and given full faith and credit by this Court. (Signed by Judge Analisa Torres on 1/6/2014) (tn) (Entered: 01/06/2014)
01/13/2014	32	NOTICE OF APPEARANCE by Robert J. Boyle on behalf of Republic of Sudan. (Boyle, Robert) (Entered: 01/13/2014)

* * *

DATE	NO.	DOCKET TEXT
01/14/2014	36	FIRST NOTICE OF APPEAL from Order, Set Deadlines, 20 Order,,,,,,,,,,,,, 11 Order,,,,,, 21 Order on Motion to Amend/Correct,,,,,,,,,,,,,, 8 Order,,,,,, 31 Order,,,,,,,,. Document filed by Republic of Sudan. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit. (Boyle, Robert) (Entered: 01/14/2014)
01/14/2014		Appeal Fee Paid electronically via Pay.gov: for 36 Notice of Appeal. Filing fee $ 505.00. Pay.gov receipt number 0208-9254314, paid on 1/13/2014. (tp) (Entered: 01/14/2014)
01/14/2014		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 36 Notice of Appeal. (tp) (Entered: 01/14/2014)
01/14/2014		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files *(ONLY)* for 36 Notice of Appeal, filed by Republic of Sudan were transmitted to the U.S. Court of

DATE	NO.	DOCKET TEXT
		Appeals. (tp) (Entered: 01/14/2014)
		* * *
12/22/2016	504	MANDATE of USCA (Certified Copy) as to 36 Notice of Appeal, filed by Republic of Sudan. USCA Case Number 14-121. Ordered, Adjudged and Decreed that the judgment of the District Court is AFFIRMED. Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Issued As Mandate: 12/22/2016. (nd) (Entered: 12/22/2016)
		* * *

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 14-121

RICK HARRISON *et al.*,
v.
REPUBLIC OF SUDAN *et al.*,

RELEVANT DOCKET ENTRIES

DATE	NO.	DOCKET TEXT
01/23/2014	1	NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellant Republic of Sudan, FILED. [1142481] [14-121] [Entered: 01/27/2014 02:55 PM]
01/23/2014	2	DISTRICT COURT ORDER, dated 10/23/2013, RECEIVED.[1142536] [14-121] [Entered: 01/27/2014 03:17 PM]
01/23/2014	3	DISTRICT COURT ORDER, dated 11/04/2013, RECEIVED.[1142542] [14-121] [Entered: 01/27/2014 03:18 PM]
01/23/2014	4	DISTRICT COURT ORDER,

DATE	NO.	DOCKET TEXT
		dated 12/12/2013, RECEIVED.[1142545] [14-121] [Entered: 01/27/2014 03:20 PM]
01/23/2014	5	DISTRICT COURT ORDER, dated 12/13/2013, RECEIVED.[1142549] [14-121] [Entered: 01/27/2014 03:20 PM]
01/23/2014	6	DISTRICT COURT ORDER, dated 01/06/2014, RECEIVED.[1142556] [14-121] [Entered: 01/27/2014 03:22 PM]
01/23/2014	7	ELECTRONIC INDEX, in lieu of record, FILED.[1142558] [14-121] [Entered: 01/27/2014 03:22 PM]
		* * *
01/29/2014	11	ORDER, dated 01/29/2014, dismissing appeal by 02/12/2014, unless Appellant Republic of Sudan submits Forms C and D, FILED.[1144836] [14-121] [Entered: 01/29/2014 01:06 PM]
02/12/2014	12	FORM C, on behalf of Appellant Republic of Sudan, FILED. Service date 02/12/2014 by CM/ECF. [1155873] [14-121] [Entered: 02/12/2014 06:53 PM]
02/12/2014	13	FORM D, on behalf of Appellant Republic of Sudan, FILED.

DATE	NO.	DOCKET TEXT
		Service date 02/12/2014 by CM/ECF. [1155875] [14-121] [Entered: 02/12/2014 06:57 PM]
		* * *
02/13/2014	15	ORDER, dated 02/13/2014, dismissing appeal by 02/27/2014, unless Appellant Republic of Sudan submits acknowledgment and notice of appearance, FILED.[1155961] [14-121] [Entered: 02/13/2014 10:08 AM]
02/26/2014	16	ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, on behalf of Appellant Republic of Sudan, FILED. Service date 02/26/2014 by CM/ECF.[1166258] [14-121] [Entered: 02/26/2014 10:21 PM]
		* * *
02/28/2014	21	NOTICE, to Appellees John Buckley, III, Rick Harrison, Andy Lopez, Margaret Lopez, Keith Lorensen, Lisa Lorensen, Edward Love, Robert McTureous, David Morales, Gina Morris, Tracey Smith, Martin Songer, Jr., Shelly Songer, Jeremy Stewart, Kesha Stidham, Aaron Toney, Eric

DATE	NO.	DOCKET TEXT
		Williams and Carl Wingate, for failure to file an appearance, SENT.[1167306] [14-121] [Entered: 02/28/2014 08:35 AM]
		* * *
02/28/2014	23	ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, on behalf of Appellee John Buckley, III, Rick Harrison, Andy Lopez, Margaret Lopez, Keith Lorensen, Lisa Lorensen, Edward Love, Robert McTureous, David Morales, Gina Morris, Tracey Smith, Martin Songer, Jr., Shelly Songer, Jeremy Stewart, Kesha Stidham, Aaron Toney, Eric Williams and Carl Wingate, FILED. Service date 02/28/2014 by CM/ECF. [1167604] [14-121] [Entered: 02/28/2014 11:36 AM]
		* * *
02/28/2014	25	LR 31.2 SCHEDULING NOTIFICATION, on behalf of Appellant Republic of Sudan, informing Court of proposed due date 05/14/2014, RECEIVED. Service date 02/28/2014 by CM/ECF.[1167643] [14-121] [Entered: 02/28/2014 11:57 AM]

DATE	NO.	DOCKET TEXT
		* * *
02/28/2014	28	SO-ORDERED SCHEDULING NOTIFICATION, setting Appellant Republic of Sudan Brief due date as 05/14/2014; Joint Appendix due date as 05/14/2014, FILED.[1167927] [14-121] [Entered: 02/28/2014 02:47 PM]
02/28/2014	29	ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, on behalf of Appellee John Buckley, III, Rick Harrison, Andy Lopez, Margaret Lopez, Keith Lorensen, Lisa Lorensen, Edward Love, Robert McTureous, David Morales, Gina Morris, Tracey Smith, Martin Songer, Jr., Shelly Songer, Jeremy Stewart, Kesha Stidham, Aaron Toney, Eric Williams and Carl Wingate, FILED. Service date 02/28/2014 by CM/ECF. [1168271] [14-121] [Entered: 02/28/2014 06:09 PM]
		* * *
05/14/2014	31	BRIEF, on behalf of Appellant Republic of Sudan, FILED. Service date 05/14/2014 by CM/ECF.[1224927] [14-121]

DATE	NO.	DOCKET TEXT
		[Entered: 05/14/2014 05:04 PM]
05/14/2014	32	JOINT APPENDIX, volume 1 of 1, (pp. 1-109), on behalf of Appellant Republic of Sudan, FILED. Service date 05/14/2014 by CM/ECF.[1224956] [14-121] [Entered: 05/14/2014 05:41 PM]
		* * *
05/28/2014	39	LR 31.2 SCHEDULING NOTIFICATION, on behalf of Appellee John Buckley, III, Rick Harrison, Andy Lopez, Margaret Lopez, Keith Lorensen, Lisa Lorensen, Edward Love, Robert McTureous, David Morales, Gina Morris, Tracey Smith, Martin Songer, Jr., Shelly Songer, Jeremy Stewart, Kesha Stidham, Aaron Toney, Eric Williams and Carl Wingate, informing Court of proposed due date 06/30/2014, RECEIVED. Service date 05/28/2014 by CM/ECF.[1235215] [14-121] [Entered: 05/28/2014 04:29 PM]
		* * *
05/29/2014	42	SO-ORDERED SCHEDULING NOTIFICATION, setting Appellee John Buckley, III, Rick

DATE	NO.	DOCKET TEXT
		Harrison, Andy Lopez, Margaret Lopez, Keith Lorensen, Lisa Lorensen, Edward Love, Robert McTureous, David Morales, Gina Morris, Tracey Smith, Martin Songer, Jr., Shelly Songer, Jeremy Stewart, Kesha Stidham, Aaron Toney, Eric Williams and Carl Wingate Brief due date as 06/30/2014, FILED.[1235446] [14-121] [Entered: 05/29/2014 09:20 AM]
		* * *
07/01/2014	48	BRIEF, on behalf of Appellee John Buckley, III, Rick Harrison, Andy Lopez, Margaret Lopez, Keith Lorensen, Lisa Lorensen, Edward Love, Robert McTureous, David Morales, Gina Morris, Tracey Smith, Martin Songer, Jr., Shelly Songer, Jeremy Stewart, Kesha Stidham, Aaron Toney, Eric Williams and Carl Wingate, FILED. Service date 07/01/2014 by CM/ECF. [1262099] [14-121] [Entered: 07/01/2014 04:31 PM]
07/01/2014	49	SUPPLEMENTAL APPENDIX, on behalf of Appellee John Buckley, III, Rick Harrison,

DATE	NO.	DOCKET TEXT
		Andy Lopez, Margaret Lopez, Keith Lorensen, Lisa Lorensen, Edward Love, Robert McTureous, David Morales, Gina Morris, Tracey Smith, Martin Songer, Jr., Shelly Songer, Jeremy Stewart, Kesha Stidham, Aaron Toney, Eric Williams and Carl Wingate, FILED. Service date 07/01/2014 by CM/ECF. [1262108] [14-121] [Entered: 07/01/2014 04:33 PM]
		* * *
07/11/2014	53	ORAL ARGUMENT STATEMENT LR 34.1 (a), on behalf of filer Attorney Brandon Levitt, Esq. for Appellee Eric Williams, Tracey Smith, Rick Harrison, John Buckley, III, Margaret Lopez, Andy Lopez, Keith Lorensen, Lisa Lorensen, Edward Love, Robert McTureous, David Morales, Gina Morris, Martin Songer, Jr., Shelly Songer, Jeremy Stewart, Kesha Stidham, Aaron Toney and Carl Wingate, FILED. Service date 07/11/2014 by CM/ECF. [1268668] [14-121]

DATE	NO.	DOCKET TEXT
		[Entered: 07/11/2014 10:09 AM]
		* * *
07/15/2014	57	ORAL ARGUMENT STATEMENT LR 34.1 (a), on behalf of filer Attorney Asim Ghafoor, Esq. for Appellant Republic of Sudan, FILED. Service date 07/15/2014 by CM/ECF. [1271092] [14-121] [Entered: 07/15/2014 10:45 AM]
		* * *
10/27/2014	61	CASE CALENDARING, for argument on 01/05/2015, SET.[1354795] [14-121] [Entered: 10/27/2014 02:00 PM]
		* * *
12/04/2014	65	NOTICE OF HEARING DATE ACKNOWLEDGMENT, on behalf of Appellee Rick Harrison, FILED. Service date 12/04/2014 by email, CM/ECF. [1384951] [14-121] [Entered: 12/04/2014 01:44 PM]
01/01/2015	66	NOTICE OF HEARING DATE ACKNOWLEDGMENT, on behalf of Appellant Republic of Sudan, FILED. Service date 01/01/2015 by CM/ECF. [1406361] [14-121] [Entered:

DATE	NO.	DOCKET TEXT
		01/01/2015 09:58 AM]
01/05/2015	67	CASE, before GEL, DC, C.JJ., KORMAN, D.J., HEARD.[1407051] [14-121] [Entered: 01/05/2015 12:09 PM]
		* * *
07/02/2015	73	ATTORNEY, Christopher M. Curran, [70], in place of attorney Asim Ghafoor, SUBSTITUTED.[1545273] [14-121] [Entered: 07/02/2015 09:38 AM]
07/02/2015	74	ATTORNEY, Nicole E. Erb for Republic of Sudan, in case 14-121 , [71], ADDED.[1545282] [14-121] [Entered: 07/02/2015 09:41 AM]
07/02/2015	75	ATTORNEY, Claire DeLelle for Republic of Sudan, in case 14-121 , [72], ADDED.[1545296] [14-121] [Entered: 07/02/2015 09:44 AM]
07/02/2015	76	MOTION, to hold appeal in abeyance, on behalf of Appellant Republic of Sudan, FILED. Service date 07/02/2015 by 3rd party, CM/ECF. [1545339] [14-121] [Entered: 07/02/2015 10:00 AM]

DATE	NO.	DOCKET TEXT
		* * *
09/23/2015	80	OPINION, the district court judgment is affirmed, by GEL, DC, E. KORMAN, FILED.[1604856] [14-121] [Entered: 09/23/2015 09:24 AM]
		* * *
09/23/2015	82	MOTION ORDER, denying motion to hold appeal in abeyance [76] filed by Appellant Republic of Sudan, by GEL, DC, E. KORMAN, FILED. [1604866][82] [14-121] [Entered: 09/23/2015 09:30 AM]
		* * *
09/23/2015	88	JUDGMENT, FILED.[1605278] [14-121] [Entered: 09/23/2015 03:12 PM]
10/07/2015	89	PETITION FOR REHEARING/REHEARING EN BANC, on behalf of Appellant Republic of Sudan, FILED. Service date 10/07/2015 by CM/ECF.[1615180] [14-121] [Entered: 10/07/2015 07:38 PM]
		* * *
10/08/2015	91	MOTION TO FILE AMICUS CURIAE BRIEF, on behalf of

DATE	NO.	DOCKET TEXT
		Movant United States of America, FILED. Service date10/08/2015 by CM/ECF.[1616083] [14-121] [Entered: 10/08/2015 06:05 PM]
		* * *
10/09/2015	94	NOTICE OF APPEARANCE AS AMICUS COUNSEL, on behalf of Movant United States of America, FILED. Service date 10/09/2015 by CM/ECF. [1616396] [14-121] [Entered: 10/09/2015 11:25 AM]
		* * *
10/09/2015	97	MOTION ORDER, granting motion to file amicus curiae brief and an extension of time until 11/06/2015 to file such brief [91], by GEL, FILED. [1616674][97] [14-121] [Entered: 10/09/2015 01:25 PM]
		* * *
11/05/2015	99	NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Amicus Curiae United States of America, FILED. Service date 11/05/2015 by CM/ECF. [1635488] [14-121] [Entered: 11/05/2015 09:37 AM]

DATE	NO.	DOCKET TEXT
		* * *
11/06/2015	101	AMICUS BRIEF, on behalf of Amicus Curiae United States of America, FILED. Service date 11/06/2015 by CM/ECF.[1636951] [14-121] [Entered: 11/06/2015 02:05 PM]
		* * *
11/10/2015	103	ORDER, dated 11/10/2015, Upon consideration of the Defendant-Appellant's petition for panel rehearing or rehearing en banc, and the brief of the United States amicus curiae supporting that petition, it is hereby Ordered that Plaintiffs-Appellees shall respond to that petition, with particular attention to the arguments raised by the United States, by filing a brief not to exceed 15 pages, on or before December 2, 2015, FILED.[1639331] [14-121] [Entered: 11/10/2015 04:54 PM]
12/02/2015	104	OPPOSITION TO PETITION FOR REHEARING/ REHEARING EN BANC, for rehearing en banc [89], on behalf of Appellee John Buckley, III, Rick Harrison,

DATE	NO.	DOCKET TEXT
		Andy Lopez, Margaret Lopez, Keith Lorensen, Lisa Lorensen, Edward Love, Robert McTureous, David Morales, Gina Morris, Tracey Smith, Martin Songer, Jr., Shelly Songer, Jeremy Stewart, Kesha Stidham, Aaron Toney, Eric Williams and Carl Wingate, FILED. Service date 12/02/2015 by CM/ECF. [1655414] [14-121] [Entered: 12/02/2015 11:18 PM]
		* * *
12/04/2015	106	MOTION, for leave to file a reply, on behalf of Appellant Republic of Sudan, FILED. Service date 12/04/2015 by CM/ECF. [1657223] [14-121] [Entered: 12/04/2015 08:20 PM]
		* * *
12/22/2015	110	MOTION ORDER, granting motion to file a reply in support of its petition for rehearing or rehearing en banc [106] filed by Appellant Republic of Sudan, by GEL, FILED. [1669969][110] [14-121] [Entered: 12/22/2015 12:39 PM]
		* * *

DATE	NO.	DOCKET TEXT
01/05/2016	112	REPLY TO OPPOSITION [104], on behalf of Appellant Republic of Sudan, FILED. Service date 01/05/2016 by CM/ECF.[1676727][112] [14-121] [Entered: 01/05/2016 04:13 PM]
		* * *
02/19/2016	115	ORDER, dated 02/19/2016, Upon consideration of the Appellant's motion for rehearing, it is hereby Ordered that oral argument on the motion is scheduled for 10:00 a.m. on Friday, March 11, in courtroom 1505. Amicus curiae the United States of America is invited to participate in the oral argument. by GEL, DC, E. KORMAN, FILED.[1708876] [14-121] [Entered: 02/19/2016 03:35 PM]
		* * *
02/23/2016	118	ARGUMENT/SUBMITTED NOTICE, to attorneys/parties, TRANSMITTED.[1711466] [14-121] [Entered: 02/23/2016 04:22 PM]
03/08/2016	119	MOTION, for leave to respond, on behalf of Appellee Rick Harrison, John Buckley, III,

DATE	NO.	DOCKET TEXT
		Andy Lopez, Margaret Lopez, Keith Lorensen, Lisa Lorensen, Edward Love, Robert McTureous, David Morales, Gina Morris, Tracey Smith, Martin Songer, Jr., Shelly Songer, Jeremy Stewart, Kesha Stidham, Aaron Toney, Eric Williams and Carl Wingate, FILED. Service date 03/08/2016 by CM/ECF. [1721893] [14-121] [Entered: 03/08/2016 12:59 PM]
		* * *
03/10/2016	122	OPPOSITION TO , for leave to respond [119], on behalf of Appellant Republic of Sudan, FILED. Service date 03/10/2016 by CM/ECF. [1724424] [14-121] [Entered: 03/10/2016 05:05 PM]
		* * *
09/22/2016	134	OPINION, PETITION FOR REHEARING DENIED, by GEL, DC, E. KORMAN, FILED.[1868465] [14-121] [Entered: 09/22/2016 09:45 AM]
		* * *
10/04/2016	137	MOTION, to file supplemental documents, on behalf of Appellant Republic of Sudan,

DATE	NO.	DOCKET TEXT
		FILED. Service date 10/04/2016 by CM/ECF. [1877014] [14-121] [Entered: 10/04/2016 02:57 PM]
		* * *
11/29/2016	140	OPPOSITION TO MOTION, to file supplemental documents [137], on behalf of Appellee John Buckley, III, Rick Harrison, Andy Lopez, Margaret Lopez, Keith Lorensen, Edward Love, Lisa Lorensen, Robert McTureous, David Morales, Gina Morris, Tracey Smith, Martin Songer, Jr., Shelly Songer, Jeremy Stewart, Kesha Stidham, Aaron Toney, Eric Williams and Carl Wingate, FILED. Service date 11/29/2016 by CM/ECF. [1916213] [14-121] [Entered: 11/29/2016 09:32 PM]
		* * *
12/01/2016	143	REPLY TO OPPOSITION [140], on behalf of Appellant Republic of Sudan, FILED. Service date 12/01/2016 by CM/ECF. [1917884][143][14-121] [Entered: 12/01/2016 12:18 PM]
12/06/2016	145	MOTION ORDER, denying motion to file supplemental

DATE	NO.	DOCKET TEXT
		petition for rehearing en banc [137] filed by Appellant Republic of Sudan, by GEL, DC, E. KORMAN, FILED. [1921396] [145] [14-121] [Entered: 12/06/2016 03:19 PM]
12/09/2016	146	ORDER, petition for rehearing en banc denied, FILED.[1924074] [14-121] [Entered: 12/09/2016 12:27 PM]
12/22/2016	147	JUDGMENT MANDATE, ISSUED.[1934057] [14-121] [Entered: 12/22/2016 12:28 PM]
03/10/2017	148	U.S. SUPREME COURT NOTICE of writ of certiorari filing, dated 03/10/2017, U.S. Supreme Court docket # 16-1094, RECEIVED.[1988831] [14-121] [Entered: 03/15/2017 10:06 AM]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed: 10/11/2010]

Civil Action No.: 1:10-cv-01689-HHK

RICK HARRISON, JOHN BUCKLEY, MARGARET LOPEZ, ANDY LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARD LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, RUBIN SMITH, MARTIN SONGER, JR., SHELLY SONGER, JEREMY STEWART, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, AND CARL WINGATE

Plaintiff,

vs.

REPUBLIC OF SUDAN,

Defendant.

NOTICE OF SUIT

Plaintiffs, Rick Harrison, et al., pursuant to 28 U.S.C. § 1608(a) and 22 C.F.R. § 93.2, file this amended notice of suit in the above referenced matter, and state as follows:

1. The title of this legal proceeding is Rick Harrison, John Buckley, Margaret Lopez, Andy Lopez, Keith Lorensen, Lisa Lorensen, Edward Love, Robert McTureous, David Morales, Gina Morris, Rubin Smith, Martin Songer, Jr., Shelly Songer,

Jeremy Stewart, Kesha Stidham, Aaron Toney, Eric Williams, and Carl Wingate, Plaintiffs, verses the Republic of Sudan, Defendant. The Court in which the suit has been filed is the United States District Court for the District of Columbia. The case number is 1:10-cv-01689-HHK.

2. The name of the foreign state involved is the Republic of Sudan.

3. The other parties are: Rick Harrison, John Buckley, Margaret Lopez, Andy Lopez, Keith Lorensen, Lisa Lorensen, Edward Love, Robert McTureous, David Morales, Gina Morris, Rubin Smith, Martin Songer, Jr., Shelly Songer, Jeremy Stewart, Kesha Stidham, Aaron Toney, Eric Williams, and Carl Wingate.

4. The nature of the documents served are a Summons, Complaint, Notice of Suit and Offer to Arbitrate.

5. The nature and purpose of the proceedings are: The reason for the suit is that on October 12, 2000, conspirators belonging to a terrorist organization commonly referred to as Al Qaeda caused an explosive device to damage the naval vessel USS Cole. The explosion caused seventeen sailors to be killed, forty-two sailors to be injured, and their family members to suffer severe emotional distress. The organization Al Qaeda had from 1991 occupied various locations within the Republic of Sudan and was given support and resources to facilitate their terrorist operation, which included the bombing of the USS Cole. The Plaintiffs are sailors that were severely injured in the attack and their spouses. The

relief sought is money damages for all plaintiffs named herein above.

6. Date of Default Judgment: none.

7. A response to a "Summons" and "Complaint" is required to be submitted to the court, not later than 60 days after these documents are received. The response may present jurisdictional defenses (including defenses relating to state immunity).

8. The Defendant, Republic of Sudan, may accept the Offer to Arbitrate within sixty (60) days of receipt of the offer by filing with the Clerk of this Court an acceptance in lieu of filing an answer or response to the herein captioned lawsuit.

9. The failure to submit a timely response with the court can result in a Default Judgment and a request for execution to satisfy the judgment. If a default judgment has been entered, a procedure may be available to vacate or open that judgment.

10. Questions relating to state immunities and to the jurisdiction of United States courts over foreign states are governed by the Foreign Sovereign Immunities Act of 1976, which appears in sections 1330, 1391(f), 1441(d), and 1602 through 1611, of Title 28, United States Code (Pub.L. 94-583; 90 Stat. 2891) (Authority: Sec. 1608(a), Foreign Sovereign Immunities Act of 1976, Pub.L. 94-583 (28 U.S.C. 1608(a)); sec. 4, 63 Stat. 111, as amended (22 U.S.C. 2658)).

Respectfully submitted,

By: /s/

NELSON M. JONES III
D.C. Bar # 320266

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Fax: (361) 727-0447
Email: corpuslaw@aol.com

CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing has been served via U.S. Mail on this 11th day of October 2010, to: Republic of Sudan, Deng Alor Koul, Minister of Foreign Affairs, Embassy of the Republic of Sudan, 2210 Massachusetts Avenue NW, Washington, DC 20008.

/s/Nelson M. Jones, III .
Nelson M. Jones, III

UNITED STATES DISTRICT
AND BANKRUPTCY COURTS
FOR THE DISTRICT OF COLUMBIA

[Filed: 11/05/10]

Civil Action No.: 10-01689-HHK

RICK HARRISON, et al.,

Plaintiff(s)

vs.

REPUBLIC OF SUDAN,

Defendant(s)

AFFIDAVIT REQUESTING FOREIGN MAILING

I, the undersigned, counsel of record for plaintiff(s), hereby request that the Clerk mail a copy of the summons and complaint (and notice of suit, where applicable) to (list name(s) and address(es) of defendants):

Republic of Sudan
Deng Alor Koul
Minister of Foreign Affairs
Embassy of the Republic of Sudan
2210 Massachusetts Avenue NW
Washington, DC 2008

by: (check one)

☒ registered mail, return receipt requested
☐ DHL

pursuant to the provisions of: (check one)

☐ FRCP 4(f)(2)(C)(ii)
☒ 28 U.S.C. § 1608(a)(3)
☐ 28 U.S.C. § 1608(b)(3)(B)

I certify that this method of service is authorized by the domestic law of (name of country): United States of America, and that I obtained this information by contacting the Overseas Citizens Services, U.S. Department of State.

/s/ Nelson M. Jones III
(Signature)

Nelson M. Jones, III
D.C. BAR # 320266
440 Louisiana St., Suite 1575
Houston, Texas 77002
(Name and Address)

UNITED STATES DISTRICT
AND BANKRUPTCY COURTS
FOR THE DISTRICT OF COLUMBIA

[Filed: 11/17/10]

Civil Action No.: 1:10-01689-HHK

RICK HARRISON

Plaintiff(s)

vs.

REPUBLIC OF SUDAN

Defendant(s)

CERTIFICATE OF MAILING

I hereby certify under penalty of perjury, that on the 17th day of November, 2010, I mailed:

1. ☐ One copy of the summons and complaint by registered mail, return receipt requested, to the individual of the foreign state, pursuant to the provisions of FRCP 4(f)(2)(C)(ii).

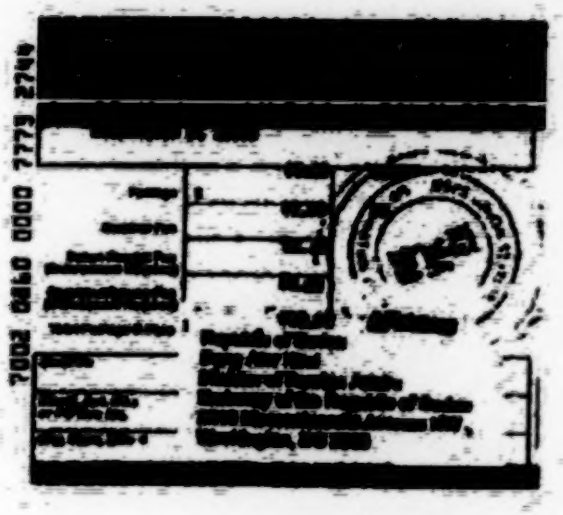
2. ☒ One copy of the summons, complaint and notice of suit, together with a translation of each into the official language of the foreign state, by registered mail, return receipt requested, to the head of the ministry of

foreign affairs, pursuant to the provisions of 28 U.S.C. § 1608(a)(3).

3. ☐ Two copies of the summons, complaint and notice of suit, together with a translation of each into the official language of the foreign state, by certified mail, return receipt requested, to the U.S. Department of State, Office of Policy Review and Interagency Liaison, Overseas Citizens Services, 2100 Pennsylvania Avenue, NW, Fourth Floor, Washington, DC 20520, ATTN: Director of Overseas Citizens Services, pursuant to the provisions of 28 U.S.C. § 1608(a)(4).

4. ☐ One copy of the summons and complaint, together with a translation of each into the official language of the foreign state, by registered mail, return receipt requested, to the agency or instrumentality of the foreign state, pursuant to 28 U.S.C. § 1608(b)(3)(B).

ANGELA D. CAESAR, CLERK
By: Daniel J. Reidy .
Deputy Clerk



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Clerk, U.S. Bankruptcy Court

RECEIVED MAIL ROOM

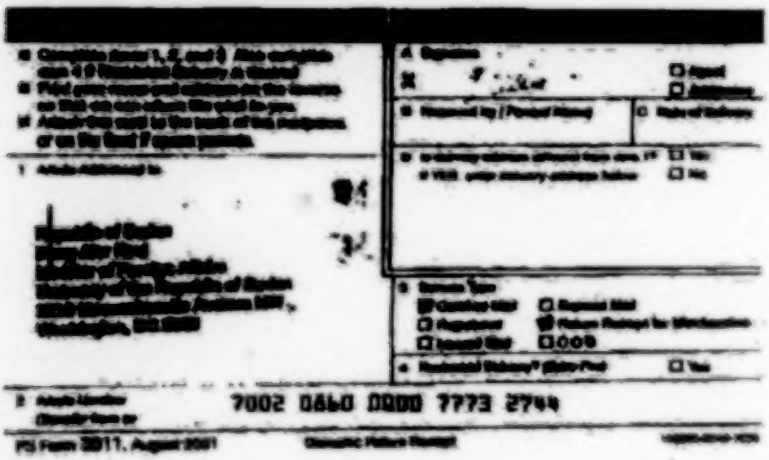
NOV 23 2010

Angela D. Caesar, Clerk of Court

US District Court, District of Columbia

10-CV-1689 (HHK)

I hereby certify under penalty of perjury, that on the 20th day of April, 2012, I mailed:



[redacted]

Track & Confirm

[redacted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed: 01/18/2011]

Civil Action No. 1:10-cv-01689-HHK

RICK HARRISON, JOHN BUCKLEY, MARGARET LOPEZ, ANDY LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARD LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, RUBIN SMITH, MARTIN SONGER, JR., SHELLY SONGER, JEREMY STEWART, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, AND CARL WINGATE

Plaintiff,

v.

REPUBLIC OF SUDAN,

Defendant.

MOTION FOR ENTRY OF CLERK'S DEFAULT

Plaintiffs, Rick Harrison, et al., pursuant to Rule 55(a), Federal Rules of Civil Procedure, move for the entry of a Clerk's default against the Defendant, Republic of Sudan, and state:

1. Pursuant to the service procedure described in 28 U.S.C. § 1608(a)(3), the Defendant, Republic of Sudan, was served via certified U.S. mail (return receipt requested) with the Summons, Complaint, and Notice of Suit in this matter and with Arabic

translations of said documents, by the Clerk of this Court, on November 17, 2010.[12]

PLEASE TAKE NOTICE that Defendant Republic of Sudan appeals to the United States Court of Appeals for the Second Circuit from the Turnover Orders [ECF Documents 20, 21 and 31] in this case of this Court (the Honorable Annalisa Torres) dated December 12, 2013, December 13, 2013 and January 6, 2014, ordering financial institutions MashreqBank, BNP Paribas and Credit Agricole Corporate & Investment Bank, respectively, to turn over funds in specified accounts to Plaintiffs in the above-styled case.

2. The U.S. Postal Service confirmed that the Defendant's received the service documents mailed by the Clerk, on November 18, 2010. (See U.S. Postal Service Return Receipt and Track & Confirm search results, attached as Exhibit "B").

3. On November 29, 2010, the Clerk of the Court confirmed the Court's receipt of the signed return receipt of the service packet. (See Clerk's Docket Entry No. 11).

4. Pursuant to 28 U.S.C. § 1608(c)(2), service on the Defendant is deemed to have been made as of November 18, 2010, the date of its receipt of the service packet.

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[1] Before proceeding under the method of service described under 28 U.S.C. § 1608(a)(3), the Plaintiffs confirmed that service could not be accomplished pursuant to 28 U.S.C. § 1608(a)(1) or (2).

[2] On October 4, 2010, the Plaintiffs served an Offer to Arbitrate on the Defendant. (See Docket Entry No. 3). The Defendant did not respond to the Plaintiff's Offer to Arbitrate.

5. Pursuant to 28 U.S.C. § 1608(d), the Defendant was required to file a response to the Plaintiffs' Complaint within sixty (60) days after service had been made. As such, the Defendant was required to file its response to the Plaintiffs' Complaint by January 17, 2011.

6. The Defendant has failed to plead, answer or otherwise defend in this cause as required by law.

7. The Plaintiffs are entitled to the entry of a Clerk's default in this matter in light of the Defendant's failure to plead, answer or otherwise defend in this cause as required by law. Fed. R. Civ. P. 55(a). A form of Clerk's Entry of Default is attached hereto for the Clerk's convenience.

WHEREFORE, Plaintiffs respectfully request that a Clerk's default be entered against the Defendant, Republic of Sudan.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing has been served via U.S. Mail on this 18th day of November 2011, to: Republic of Sudan, Deng Alor Koul, Minister of Foreign Affairs, Embassy of the Republic of Sudan, 2210 Massachusetts Avenue NW, Washington, DC 20008.

/s/ Nelson M. Jones III
Nelson M. Jones III

Default – Rule 55A (CO 40 Revised 2/2010)

UNITED STATES DISTRICT
AND BANKRUPTCY COURTS
FOR THE DISTRICT OF COLUMBIA

[Filed: 01/19/2011]

Civil Action No.: 1:10-01689-HHK

RICK HARRISON, et al

Plaintiff(s)

vs.

REPUBLIC OF SUDAN

Defendant(s)

RE: REPUBLIC OF SUDAN

DEFAULT

It appearing that the above-named defendant(s) failed to plead or otherwise defend this action though duly served with summons and copy of the complaint on November 18, 2010, and an affidavit on behalf of the plaintiff having been filed, it is this 19th day of January, 2011 declared that defendant(s) is/are in default.

ANGELA D. CAESAR, CLERK
By: /s/ N. Wilkens
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed: 03/30/2012]

Civil Action No. 10-1689 (RCL)

RICK HARRISON, et al.,

Plaintiffs,

v.

REPUBLIC OF SUDAN,

Defendant.

ORDER AND JUDGMENT

In accordance with the Memorandum Opinion issued this day, it is hereby

ORDERED that final judgment is entered in favor of plaintiffs and against defendant;

ORDERED that plaintiffs are awarded $78,676,474 in compensatory damages and $236,029,422 in punitive damages, for a total award of $314,705,896 to be distributed as follows:

	Economic	Pain and Suffering	Solatium	Punitive	Total
Aaron Toney	196,040	1,500,000	0	5,088,120	6,784,160
Carl Wingate	198,365	5,000,000	0	15,595,095	20,793,460
David Morales	248,108	2,000,000	0	6,744,324	8,992,432
Edward Love	279,613	2,000,000	0	6,838,839	9,118,452
Eric Williams	553,253	3,000,000	0	10,659,759	14,213,012
Gina Morris	562,577	1,500,000	0	6,187,731	8,250,308
Jeremy Stewart	515,627	7,500,000	0	24,046,881	32,062,508
Kesha Stidham	873,104	5,000,000	0	17,619,312	23,492,416
Margaret Lopez	52,594	7,500,000	0	22,657,782	30,210,376
Martin Songer	509,174	2,000,000	0	7,527,522	10,036,696
Rick Harrison	296,083	5,000,000	0	15,858,249	21,144,332
Robert McTurnous	907,936	5,000,000	0	17,705,808	23,607,744
John Buckley III	0	7,500,000	0	22,500,000	30,000,000
Keith Lorenson	0	5,000,000	0	15,000,000	20,000,000
Rubin Smith	0	5,000,000	0	15,000,000	20,000,000
Shelly Songer	0	0	1,000,000	3,000,000	4,000,000
Lisa Lorenson	0	0	4,000,000	12,000,000	16,000,000
Andy Lopez	0	0	4,000,000	12,000,000	16,000,000

and it is further

ORDERED that plaintiffs shall, at their own cost and consistent with the requirements of 28 U.S.C. § 1608(e), send a copy of this Order and Judgment, and the Memorandum Opinion issued this date, to defendants.

SO ORDERED.

/s/ Royce C. Lamberth
ROYCE C. LAMBERTH,
United States District Chief Judge

Dated: March 30, 2012

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed: 03/30/2012]

Civil Action No. 10-1689 (RCL)

RICK HARRISON, et al.,

Plaintiffs,

v.

REPUBLIC OF SUDAN,

Defendant.

MEMORANDUM OPINION

This case arises out of the bombing of the U.S.S. Cole ("the Cole") on October 12, 2000. The attack ripped a thirty-two-by-thirty-six-foot hole in the side of the vessel when it was berthed in Yemen's Aden Harbor. Seventeen servicemen and women were killed, and forty-two suffered injuries. The eighteen plaintiffs before this Court are fifteen former sailors who were injured while on the Cole and three of their spouses, who, although not on the Cole during the attack, allegedly suffered emotional distress upon learning of the incident.[1] Plaintiffs bring this action

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[1] Since the filing of this lawsuit, one plaintiff, Rubin Smith, has died. After his claim was severed, his spouse, as

under the "state-sponsored terrorism" exception to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602 *et seq.*[2] Plaintiffs allege that defendant Republic of Sudan ("Sudan") is liable for their injuries by virtue of its support of Al Qaeda, which perpetrated the Cole bombing. Before the Court is [Dkt # 14] plaintiffs' motion for a default judgment against Sudan. After making pertinent findings of fact, the Court concludes that plaintiffs have provided sufficient evidence to establish a cause of action against Sudan under FSIA's state-sponsored terrorism exception, that Sudan is liable to the plaintiffs for the alleged harms, and that plaintiffs are entitled to both compensatory and punitive damages. In accordance with these findings and conclusions, the Court awards damages to plaintiffs.

I. BACKGROUND

A. Prior and Current USS Cole Litigation

Two cases involving the Cole attack relate to the case at bar and speak to the question of Sudan's liability for the Cole attack. In *Rux v. Republic of Sudan* fifty-seven survivors of the seventeen sailors who died in the Cole attack sued Sudan for damages. *Rux v. Republic of Sudan*, 2005 WL 2086202 (Aug. 26, 2005). After defaulting, Sudan moved to dismiss plaintiffs' claims on jurisdictional and immunity

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administrator of his estate and upon motion, rejoined the case [Dkt. #34].

[2] This provision which was enacted as part of the 2008 National Defense Authorization Act ("NDAA"). Pub. L. No. 110-181, § 1083, codified at 28 U.S.C. § 1605A. It creates a "federal right of action against foreign state." *Simon v. Republic of Iran*, 529 F. 3d 1187, 1190 (D.C. Cir. 2008).

grounds. The district court denied Sudan's motion, concluding that plaintiffs had alleged sufficient jurisdictional facts to bring their case within the FSIA state-sponsored terrorism exception. *Id.* Sudan appealed. The United States Court of Appeals for the Fourth Circuit affirmed the district court, finding that plaintiffs' allegations met FSIA's jurisdictional pleading requirements "by describing how Sudan provided Al-Qaeda a base of operations to plan and prepare for the bombing, and provided operational support for the attack." *Rux v. Republic of Sudan*, 461 F.3d 461, 473-74 (4th Cir. 2006). The district court then proceeded to the merits of plaintiffs' claims and concluded that, even though Sudan was liable for plaintiff's injuries, plaintiffs were only entitled to damages under the Death on the High Seas Act (DOHSA), 46 U.S.C. § 30302. The Court held that "[w]hile the FSIA vests jurisdiction in federal courts to hear cases against foreign states, it does not afford plaintiffs with a substantive cause of action." 495 F. Supp. 2d 541, 555 (E.D. Va 2007). Accordingly, the district court dismissed plaintiffs' maritime and state law claims and awarded eligible plaintiffs $ 7,956,344 under DOHSA. *Id.* at 567-69. Plaintiffs appealed the district court's judgment. While this appeal was pending, Congress passed the 2008 NDAA amendment to the FSIA which, in addition to creating a federal private right of action, added punitive damages and solatium as recoverable damages in a new section of the FSIA, § 1605A. *See* 28 U.S.C. § 1605A(c). Under this provision, the same fifty-seven *Rux* plaintiffs filed a second lawsuit in August 2010, joining with two new plaintiffs to the case. *Kumar v. Republic of Sudan*, 2011 WL 4369122

(E.D. Va. Sept. 19, 2011). The same district court that heard *Rux* considered and rejected the claims of the plaintiffs to whom it had awarded judgments in the previous litigation, reasoning that both *res judicata* and the prohibition on legislative reopening of final judgments barred them. *Id.* at *10-11 (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 241 (1995)). The court therefore awarded damages only to the new plaintiffs who had not been party to the previous *Rux* litigation. *Id.* at *11.[3] Plaintiffs in the case at bar were not plaintiffs in *Rux* or *Kumar*.

The Court underscores an important matter before proceeding: because plaintiffs in this case bring their action under the new § 1605A, they are entitled to types of damages — i.e. for pain and suffering and solatium — and punitive damages that the *Rux* plaintiffs, who initiated their action before § 1605A was enacted, did not obtain. As the Court will explain below, these new damages can amount to substantially larger sums than the *Rux* court awarded those plaintiffs. The Court regrets this disparity and emphasizes that the difference primarily reflects a change in the governing statute rather than this Court's assessment of the relative

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[3] The Court respectfully disagrees with the *Kumar* court's application of *res judicata* to bar plaintiffs' claims. For purposes of that doctrine, this Court is not persuaded that there is a meaningful distinction between the procedural posture of the *Kumar* plaintiffs and that of the plaintiffs in *In re Islamic Republic Iran Terrorism Litigation* where this Court concluded that *res judicata* did not preclude claims filed under § 1605A even though they had been litigated under § 1605(a)(7). *In re Islamic Republic of Iran Terrorism Litigation*, 659 F. Supp. 2d 31, 84-85 (D.D.C. 2009).

hardship endured by the *Rux* plaintiffs and the plaintiffs currently before the Court.

B. Plaintiffs' Claims Before This Court

Plaintiffs effected service of the complaint, summons, and notice of suit on Sudan by mail. *See* 28 U.S.C. § 1608(a)(3). Sudan accepted service on November 17, 2010. Return of Service/Affidavit, Nov. 23, 2010 [Dkt. # 11]. Under § 1608(d) of the FSIA, this service obligated Sudan to serve and answer or other responsive pleading within 60 days after service. 28 U.S.C. § 1608(d). It failed to do so. On January 19, 2011 plaintiffs obtained entry of default from this court. Clerk's Entry of Default, Jan. 19, 2011 [Dkt. # 13]. Plaintiffs now move for a default judgment [Dkt. # 14]. To date, Sudan has not served an answer or any other responsive pleading.

II. LEGAL STANDARDS

A. Default Judgment

The FSIA states that a court shall not enter a default judgment against a foreign state "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e); *Roeder v. Islamic Republic of Iran*, 333 F. 3d 228, 232 (D.C. Cir. 2003). This standard mirrors that applied to entry of default judgment against the United States in Federal Rule of Civil Procedure 55(d).[4] *See Hill v. Republic of Iraq*, 328 F. 3d 680, 684 (D.C. Cir. 2003). FED. R. CIV. PROC. 55(d).

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[4] Rule 55(d) provides: "no default [judgment] shall be entered against the United States . . . unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." FED. R. CIV. P. 55 (d).

In considering motions for default judgment, a court may accept as true the plaintiffs' "uncontroverted evidence," *Wachsman v. Islamic Republic of Iran*, 603 F. Supp. 2d 148, 155 (D.D.C. 2009) including proof by affidavit. *See Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 83-85 (D.D.C. 2010). On September 21, 2011 an evidentiary hearing was held before the Honorable Henry H. Kennedy, Jr.[5] During that hearing, the Court accepted evidence in form of depositions, affidavits, expert testimony, and original documentary evidence. Reviewing these submissions, this Court will determine whether or not the evidence is sufficiently "satisfactory" to prove Sudan's liability and the damages that plaintiffs seek. 28 U.S.C. § 1608(e).[6]

B. Jurisdiction and Immunity

To state a viable claim, plaintiffs must first demonstrate that this Court has jurisdiction to hear the claims they assert and that Sudan is not entitled to immunity from suit. The FSIA is the "sole basis of jurisdiction over foreign states in our courts." *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 39 (D.D.C. 2009). While foreign sovereigns enjoy general immunity from suit in U.S. courts, FSIA § 1605A establishes a waiver provision that is conditioned on a number of factors.

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[5] Courts are not required to hold an evidentiary hearing, *see Bodoff v. Islamic Republic of Iran*, 424 F. Supp. 2d 74, 78 (D.D.C. 2006), but typically do so as a matter of custom and acknowledgment of the defendants' sovereign status.

[6] This case was reassigned to the undersigned judge on November 4, 2011 after Judge Kennedy's retirement. I have carefully reviewed all of the evidence presented to Judge Kennedy.

Specifically, a foreign state is not immune from suits in which the following factors are met: (1) money damages are sought (2) against that state for (3) personal injury or death that (4) was "caused by" (5) an act of torture, extrajudicial killing . . . or the provision of material support of resources for such an act if such act or provision of material support or resources is engaged in by an official, employee or agent of such foreign state while acting within the scope of his or her office, employment or agency." 28 U.S.C. § 1605(A)(a)(1); *accord Owens v. Republic of Sudan*, 2011 WL 5966900, at *17 (D.D.C. Nov. 11, 2011).[7] Because plaintiffs in this case do not allege torture or extrajudicial killing, only the "material support" provision is relevant to the case at bar. With regard to § 1605A's causation requirement, in this Circuit there must be "some reasonable connection between the act or omission of the defendant and the damages which the plaintiff has suffered." *Valore*, 700 F. Supp. 2d 52, 66 (internal quotations omitted).

Furthermore, the FSIA provides that courts "shall hear a claim" under § 1605A of the FISA if (1) the foreign state was designated as a state sponsor of terrorism at the time the act occurred; (2) the claimant was a United States national, a member of

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[7] "[T]he defendant bears the burden of proving that the plaintiff's allegations do not bring its case within a statutory exception to immunity." *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) (citing *Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1002 (D.C. Cir. 1985) and *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1171 (D.C. Cir. 1994)); *Owens v. Republic of Sudan*, 412 F. Supp. 2d 99, 94 (D.D.C. 2006) (citing *Phoenix* and stating "sovereign immunity is in the nature of an affirmative defense.").

the armed forces, or otherwise an employee or contractor of the Government of the United States, acting within the scope of her employment and (3) the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim, provided that the act occurred in the foreign state against which the claim is brought. 28 U.S.C. § 1605(A)(a)(2). Combined, these § 1605A(a)(1) and (a)(2) factors determine the Court's jurisdiction over the present case and whether Sudan has effectively waived its immunity from suit. To resolve these threshold questions, the Court first makes relevant findings of fact, as discussed below.

C. Cause of Action and Theory of Liability

After establishing jurisdiction, plaintiffs must also advance a theory of recovery that is supported by the evidence presented to the court. When a state is subject to suit under an exception to immunity, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." *Id.* § 1606.

Section 1605A(c) of the FSIA creates an explicit "private right of action," which, when read in concert with §1605A(a)(1), establishes the requirements for a viable claim. *Id.* §1605A(a)(1). Courts have interpreted the FSIA-created cause of action to require plaintiffs to prove a theory of liability under which defendants cause the alleged injury or death. *Valore*, 700 F. Supp. 2d at 73; *see also Rimkus v. Islamic Republic of Iran*, 750 F. Supp. 2d 163, 176 (D.D.C. 2010). Plaintiffs must supply the elements of each specific claim — in this case, assault, battery, and intentional infliction of emotional distress

("IIED"). Because the statute is silent as to these elemental requirements, courts in this district apply principles of law found in the Restatement of Torts and other leading treatises. *See, e.g., Valore*, 700 F. Supp. 2d at 76; *In re Islamic Republic of Iran Terrorism Litigation*, 659 F. Supp. 2d at 60 n.19; *Heiser v. Islamic Republic of Iran (Heiser II)*, 659 F. Supp. 2d 20, 24 (D.D.C. 2009); *see also Bettis v. Islamic Republic of Iran* 315 F.3d 325, 333 (D.C. Cir. 2003) ("[F]ederal courts in FSIA . . . cases have accepted § 46 of the Restatement (Second) of Torts as a proxy for state common law of intentional infliction of emotional distress"). Having established the applicable law and evidentiary requirements, the Court now reviews the evidence and makes findings of fact.

III.FINDINGS OF FACT

A. Judicial Notice of Facts Found in Other Courts

As a preliminary matter, the Court must determine whether or not it will take judicial notice of findings made in *Rux*, as plaintiffs request [Dkt. #26]. As discussed above, both the district court and the Fourth Circuit concluded in that litigation that plaintiffs had alleged sufficient facts as to Sudan's material support of Al Qaeda and the Cole attack and that the country was therefore not immune from suit. *Rux*, 495 F. Supp. 2d at 554 (citing and reaffirming *Rux v. Sudan*, 461 F.3d at 467-75 (E.D. Va 2006); *Rux*, 461 F.3d at 473-74.[8] The district court then

[8] Sudan appeared in these earlier proceedings. It filed a motion to dismiss, which was denied on August 26, 2005. *Rux*, 495 F. Supp. 2d at 543. On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the Eastern District of

proceeded to find that, as a matter of fact, Sudan had provided such support and was liable for plaintiffs' harm. *Rux*, 495 F. Supp. 2d at 556.

Courts in this district have taken judicial notice of related FSIA proceedings and findings of fact made therein. *See, e.g.*, *Estate of Doe v Islamic Republic or Iran*, 808 F. Supp. 2d 1 (D.D.C. 2011) (taking judicial notice of facts found in *Dammarell v. Islamic Republic of Iran*, 2006 WL 2583043 (D.D.C. Sept. 7, 2006) which found Iran had provided material support to Hizbollah for the attack on the U.S. Embassy in Beirut); *Brewer v. Islamic Republic of Iran*, 664 F. Supp. 2d 43 (D.D.C. 2009) (taking notice of the same for *Wagner v. Islamic Republic of Iran*, 172 F. Supp. 2d 128, 132 (D.D.C. 2001)); *Taylor v. Islamic Republic of Iran*, 811 F. Supp. 2d 1, 6-7 (D.D.C. 2011) (taking notice of facts found in *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46 (D.D.C. 2003), which found Iran provided material support for the 1984 bombing of the U.S. Marine barracks)). Indeed, "[t]he statutory obligation found in § 1608(e) was not designed to impose the onerous burden of re-litigating key facts in related cases arising out of the same terrorist attack," *Rimkus v. Republic of Iran*, 750 F. Supp. 2d 163, 172 (D.D.C. 2010). Thus, when a court has found facts relevant to

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Virginia's ruling. Subsequently, counsel for Sudan notified the Eastern District that they would not defend nor participate in the proceeding on the merits. A clerk default was entered, and the matter proceeded to trial. *Id.* Counsel for Sudan attended trial but did not participate other than to make a brief closing statement regarding damages. *Id.* Based upon the evidence submitted at trial, judgment was entered against Sudan on July 25, 2007. *Id.* at 566-69.

a FSIA case involving material support to terrorist groups, courts in subsequent, related cases may "rely upon the evidence presented in earlier litigation . . . without necessitating the formality of having that evidence reproduced." *Taylor*, 811 F. Supp. 2d at 7.

At the same time, taking *notice* of another court's finding of fact does not necessarily denote *adoption* or *finding* of that fact. Indeed, just as "findings of fact made during this type of one-sided hearing should not be given a preclusive effect," *Weinstein v. Islamic Republic of Iran*, 175 F. Supp. 2d 13, 20 (D.D.C. 2001), they also "should not be assumed true beyond reasonable dispute." *Murphy v. Islamic Republic of Iran*, 740 F. Supp. 2d 51, 58-59 (D.D.C. 2010). Moreover, because "default judgments under the FSIA require additional findings than in the case of ordinary default judgments," *Weinstein*, 175 F. Supp. 2d at 19-20, the Court "should endeavor to make such additional findings in each case." *Murphy*, 740 F. Supp. 2d at 59. Therefore, taking judicial notice of the facts established by the *Rux* court, does not conclusively establish the facts found in *Rux* for, or the liability of the defendants in, this case. Based on this judicial notice of evidence presented in earlier, similar cases "courts may reach their own independent findings of fact." *Anderson v. Islamic Republic of Iran*, 753 F. Supp. 2d 68, 75 (D.D.C. 2010). As a result, employing this FSIA-specific approach to judicial notice-taking of prior proceedings, the Court grants plaintiffs' motion to take judicial notice of the findings of fact in *Rux* [Dkt. # 26], reviews the relevant evidence, and makes its own findings of fact and conclusions of law. Turning

to the facts presented and noticed, the Court finds the following:

1. The USS Cole Bombing[9]

At approximately 8:30 a.m. on October 12, 2000, the Cole entered the Port of Aden, Yemen, to temporarily stop for refueling. The ship began refueling at approximately 10:31 a.m. At approximately 11:10 a.m., a small boat manned by two drivers pulled up parallel to the ship. Seconds later, the boat exploded.

The explosion occurred between approximately 11:15 and 11:18 a.m., just as some of the crew was sitting down for lunch. The blast ripped a large hole in the port side of the ship, and the main engine room, auxiliary machine room, and a storeroom were flooded. Smoke, dust, and fuel vapors filled the air. Several chambers were structurally destroyed. As discussed above, the blast and its after-effects killed seventeen navy sailors, and forty-two others were injured.

2. Sudan's Support of the USS Cole Bombing[10]

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[9] This section is based on a Navy report cited in *Rux*: Investigation to Inquire Into the Actions of USS Cole (DDG 67) In Preparing For And Undertaking a Brief Stop For Fuel at Bandar at Tawahi (Aden Harbor) Aden, Yemen, On Or About 12 October 2000. *See Rux*, 495 F. Supp. 2d at 544 n.12 (citing report). The report describes the attack and its aftermath, and the Court summarizes relevant portions here.

[10] In determining whether Sudan provided material support and assistance to Al Qaeda in perpetrating the attack on the Cole, the Court accepts the deposition testimony from three experts including: Lorenzo Vidino, a Research Program Manager at the Jebsen Center for Counter-Terrorism Studies at The Fletcher School of Tufts University, Ex. 78; James Woolsey, the director of the Central Intelligence Agency from 1993 to 1995, Ex. 79; and Steve Emerson, Executive Director of The Investigative Project on Terrorism and an expert on Islamic

a. Sudan and Al Qaeda

Since 1993, the United States has designated Sudan as a state sponsor of terrorism. 58 Fed. Reg. 52523-01 (Oct. 8, 1993); U.S. Department of State, State Sponsors of Terrorism, available at http://www.state.gov/j/ct/c14151.htm (last visited March 22, 2012). During the 1990s, Hassan Abdallah Turabi, head of the Sudanese political party and leader of the Muslim Brotherhood and the National Islamic Front ("NIF"), transformed Sudan into a centralized, Islamic state that supported movements and organizations with militant Islamic ideologies. Exs. 80 at 12 & 81 at 18-19.

As is well-known today, Al Qaeda is a worldwide terrorist network. Ex. 81 at 29:4-7. Founded by Osama Bin Laden in approximately 1990, Ex. 22, it has organized, executed or inspired acts of terrorism around the world that killed or injured thousands of innocent people, including the September 11, 2001 attacks on the United States. Exs. 28 & 74 at 70.

According to the U.S. State Department, Bin Laden relocated to Sudan from Afghanistan in 1991, where he was welcomed by Turabi. Ex. 17. Turabi and Bin Laden shared a common extremist ideological and religious outlook. Bin Laden agreed to help Turabi in the regime's ongoing war against African Christian separatists in southern Sudan, and also to invest his wealth in the poor country's infrastructure. Exs. 81 at

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extremist networks. Ex. 77. The Court accepts each as an expert witness on terrorism, the relationship between Al Qaeda and Sudan, and the material support Sudan provided to Al Qaeda for the Cole bombing.

21-23 & 74 at 57. In exchange, Sudan provided Bin Laden's fledgling terrorist group with a sanctuary within which it could freely meet, organize, and train militants for operations. Ex. 80 at 13:3-14:7. In 1996, he was expelled from the country under international pressure and returned to Afghanistan. Exs. 23 & 74 at 57, 109. Both before and after this departure, the effects of Sudan's support of Al Qaeda were substantial.

b. Joint Business Ventures

Bin Laden established several joint business ventures with the Sudanese regime that began to flourish upon his arrival in the Sudanese capital of Khartoum in 1991. Ex. 17. Bin Laden formed symbiotic business relationships with wealthy NIF members by undertaking civil infrastructure development projects on the regime's behalf. *Id.* These included Al-Hijrah for Construction and Development, Ltd., which built the Tahaddi road between Khartoum and Port Sudan on the Red Sea coast, as well as a modern international airport near Port Sudan; Wadi al-Aqiq Company, Ltd., which, dealt in gum, corn, sunflower, and sesame products; and Al-Themar al-Mubarak-ah Agriculture Company, Ltd., which acquired large tracts of land near Khartoum and in eastern Sudan. Exs. 17 & 32 at 239, 241. These businesses provided income to Al Qaeda, as well as cover for the procurement of explosives, weapons, and technical equipment, and for the travel of Al Qaeda operatives. Exs. 24 & 74 at 57-58. Bin Laden continued to maintain his substantial business interests and facilities in Sudan even after his departure to Afghanistan in 1996. Exs. 23 & 82 at 26-27.

c. Banking Support

Sudan allowed its banking institutions to be used by Al Qaeda to launder money. Ex. 81 at 25. Indeed, Bin Laden and wealthy members of the NIF capitalized Al-Shamal Islamic Bank in Khartoum; Bin Laden personally invested $50 million in the bank. Exs. 17 & 32 at 332. In the late 1980s, Sudan adopted an Islamic banking system that forbids interest and lacks the rigorous accounting standards used by Western banking systems. Ex. 81 at 36. The lack of scrutiny associated with this system was ideal for Al Qaeda because it allowed the group to move large sums of money in support of its operations without detection. Exs. 81 at 52 & 80 at 15. Douglas Farah, former reporter for the Washington Post in West Africa and author of the book "Blood From Stones: The Secret Financial Network of Terror," Ex. 76, asserted in a written deposition, that Sudan "provided [Al Qaeda] fundamentally with a banking structure, Islamic structure that's out of the norm of the banking rules that we're acquainted with in the west, and allowed them channels to move money through that would be virtually undiscoverable to the outside world." Ex. 80 at 14-15, 26. He further stated that Al Qaeda "couldn't have operated with that degree of freedom and openness if they had not been sanctioned by the central government to do so." *Id.*

d. Training and Direct Finance of Terrorist Groups

Starting in the early 1990s, Turabi and the Sudanese regime convened annual conferences in Sudan under the label Popular Arab and Islamic Conference. Ex. 80 at 26:13-27:15; Ex. 82 at 19:16-

20:22. At these conferences, Bin Laden and other top leaders and operatives from the most violent Islamic terrorist organizations congregated to exchange information and plan terrorist activities. Exs. 74 at 61 & 81 at 26. Although the conference was closed down in approximately 2000, Sudan continued to be used as a safe haven by Al Qaeda and other terrorist groups. Ex. 35.

In addition, as reported by the U.S. Department of State in its annual "Patterns of Global Terrorism" reports, the Sudanese military cooperated with Bin Laden and Al Qaeda to finance at least three terrorist training camps in northern Sudan. Ex. 17. As well, each year from 1997 through 2000, Sudan served as a meeting place, safe haven, and training hub for Al Qaeda and other terrorist groups including Lebanese Hizballah, Palestinian Islamic Jihad, Abu Nidal Organization, and Hamas. *See* Exs. 22; 25; 28; 35. Most of the groups maintained offices and other forms of representation in the capital, using Sudan primarily as a secure base for organizing terrorist operations and assisting compatriots elsewhere." Exs. 25 & 28. Moreover, Ayman Al-Zawahiri, a top-ranking member of Al Qaeda, reached an agreement in 1998 with Sudan's national Islamic groups to establish budgets to finance terror operations. Ex. 81 at 43:9-44:4. Bin Laden's construction company worked directly with Sudanese military officials to transport and provision the camps, where terrorists of Egyptian, Algerian, Tunisian, and Palestinian origin received training. *Id.*

Sudan's support of Al Qaeda continued after Bin Laden's 1996 departure until at least the Cole bombing. Ex. 80 at 12:11-23. As of 1999, this

assistance consisted of "paramilitary training, money, religious indoctrination, travel, documents, safe passage, and refuge." As of 2000 support "included the provision of travel documentation, safe passage, and refuge." Ex. 28.

e. Diplomatic Cover

As early as 1998, Sudan provided Al Qaeda members with Sudanese diplomatic passports, diplomatic pouches, and regular Sudanese travel documentation that facilitated the movement of Al Qaeda operatives in and out of the country. Exs. 22, 25, 35, 53, 81 at 31; 83 at 28. Diplomatic passports allow the holder to pass through airport security in airports and ports around the world without her bags being checked and without the same level of scrutiny or searches normally given to regular passport holders. Exs. 80 at 17; 81 at 32. A diplomatic passport typically lasts between five and ten years. Ex. 81 at 33. Thus, the passports issued in 1998 would not have expired prior to 2003. *See id.* Diplomatic pouches enjoy diplomatic immunity from search or seizure. Al Qaeda agents with these passports and pouches were therefore able to enter and leave Sudan and cross borders in other countries carrying materials to prepare for attacks without arousing suspicion. Exs. 82 at 19; 81 at 33; 83 at 31; 80 at 14. Indeed, it was critical to Al Qaeda's method of training its operatives in one country and then dispatching them with their materials to other countries to carry out operations or await instructions. Ex. 83 at 25:5-26:5; Ex. 83 at 31:9-32:1. By providing such cover to Al Qaeda, Sudan enabled the terrorist organization to transport weapons and munitions outside the country and into other

countries undetected by customs agents. Exs. 82 at 25; 80 at 18.

f. Sudan's Connection to the Cole Attack

While receiving support from Sudan, Al Qaeda prepared the strike against the Cole. The attack was part of a decade-long plan conceived and executed by Bin Laden and Al Qaeda to confront U.S. interests in the Middle East. Ex. 72 at 29. Bin Laden supervised the Cole plot directly. Ex. 74 at 190. As stated in the 9/11 Commission Report, Bin Laden "chose the target and location of the attack, selected the suicide operatives, and provided the money needed to purchase explosives and equipment." *Id.* Mr. Emerson and Mr. Vidino both testified that the attack's "mastermind" was Qaed Salim Sinan al-Harethi, also known as Ali Qaed Sinan Harthi, who was one of Bin Laden's bodyguards. Exs. 81 at 45-46; 83 at 33. They further assert that Al-Harethi was trained by Al Qaeda in Sudan in the 1990s before being dispatched to Yemen where, according to Mr. Vidino, he became "the chief of operation[s] of Al Qaeda in Yemen." Ex. 81 at 46.

In addition to training, Sudan was "more likely than not" the source of the explosives used in the Cole bombing, according to CIA Director Woolsey. Ex. 82 at 46. Mr. Emerson testified, "I have no doubt the source [of the explosives used on the Cole] came from Al Qaeda and was transported to Yemen from Al Qaeda or by the Sudanese government through most probably the diplomatic pouch." Ex. 80 at 18-19. Mr. Farah testified that his "best guess" as to the source of the explosives used in the Cole, based on his "studied opinion and having discussed this case with

intelligence officials," is Sudan, "which was the closest place to Yemen in which they had the safe quarter in which to be able to move this type of goods across the border." Ex. 80 at 18-19. As well, according to Mr. Emerson, the explosives used in the Cole attack were sent by Al Qaeda operatives in Sudan. Ex. 83 at 25:20-26:5. In criminal proceedings arising out of the 1998 embassy bombings, one of Bin Laden's lieutenants in Sudan, Jamal Al-Fadl, corroborated this fact when he testified against Bin Laden. Ex. 32, *U.S. v. Bin Laden*, 397 F. Supp. 2d 465 (S.D.N.Y 2005), Case No. 98-cr-1023, Trial Tr. Feb. 6, 2001. Specifically, Mr. Al-Fadl stated under oath that he worked under Bin Laden in Sudan; that he stored four crates of weapons and explosives at a farm in Sudan owned by Bin Laden; and that he shipped the four crates in an Al Qaeda-owned boat from a facility owned by the Sudanese military in Port Sudan to Yemen, where they were to be used to "fight the Communists." Ex. 32 at 262, 336-40.

In sum, the evidence suggests that Sudan provided Al Qaeda with the support, guidance, and resources that allowed it to transform into a sophisticated, terrorist network, and that such support was critical to Al Qaeda developing the expertise, networks, military training, munitions, and financial resources necessary to plan and carry out the Cole attack. Ex. 83 at 25:5-28:14. As Mr. Woolsey testified, "[t]he proximity of Sudan to Yemen, the need for a protected logistics infrastructure, the confused situation in the Government of Yemen at the time . . ., the amount of explosives that needed to be put in the boat that attacked the Cole, all that suggests to me that the logistical support and base of operations

that could have been available in Sudan could have been of substantial assistance to an attack in Yemen, such as the one that occurred." Ex. 82 at 29. He summarized: the Cole attack "might have been possible, but it would not have been as easy" without Sudan's support. *Id.* In addition, Mr. Vidino stated that the bombing would have been "close to impossible" without Sudan's assistance because "simply all they needed, starting from the training to the explosives, to all what a terrorist cell needs, even the ideological aspect of it, came from Sudan. It was clearly necessary to have all these things in place to carry out an operation such as the attack on the Cole." Ex. 81 at 47-48. In addition, Mr. Emerson asserted that the Cole attack would not have occurred without Sudan. Ex. 157 at 34. According to Emerson, by removing Sudan's support, "[y]ou would have deprived them of the oxygen needed to operate." *Id.* Moreover, Mr. Farah testified that he did not think the bombing of the Cole could have happened "without the active support of the Government of Sudan . . . from 1992 through the Cole bombing, Sudan provided an incredibly necessary and vital infrastructure for Al-Qaeda to be able to prepare and move the explosives and carry out the attacks on the Cole. And it was not clandestine or hidden presence, but rather fairly overt and knowing presence by senior members of the NIF government in Sudan." Ex. 80 at 14, 27-30.

In light of the submitted reports, testimony, and other uncontroverted evidence, the Court finds that Sudan provided material support to Al Qaeda such that the terrorist organization could attack the Cole. The conforms to the findings of the *Rux* court,

discussed above. With this fact established, the Court now turns to the uncontested evidence plaintiffs have submitted on the nature and extent of their injuries.

B. Plaintiff's Injuries

1. Plaintiffs on the Cole During the Attack

Plaintiffs who were on the Cole during the attack, each allege assault, battery and IIED. They claim injuries in the form of post-traumatic stress, lost physical abilities, and anguish, and they seek compensatory and punitive damages. Each individual's claim is explained in more detail below.

Rick Harrison

Rick Harrison was born on January 30, 1962, in Cut Bank, Montana. Ex. 92 at 6:24-7:6. On January 19, 1982, Mr. Harrison enlisted in the Navy. Ex. 92 at 7:15-17. He intended to remain in the Navy as a career. Ex. 92 at 7:23-8:17. In July 1999, he was assigned to serve on the Cole as a fire marshal. Ex. 92 at 8:20-24.

At the time of the bombing, Mr. Harrison was on the starboard side of the ship walking past the medical station. Ex. 92 at 15:10-17. He was located approximately 47 feet from the blast. Ex. 92 at 16:13-24. The blast threw him toward the overhead, causing him to strike his head and suffer a concussion. Ex. 92 at 17:14-18:1. Mr. Harrison landed directly on his knees causing severe injuries to his knees, back. The blast also damaged the membranes in his ears. Ex. 92 at 17:14-18:1, 18:22-20:1. Mr. Harrison inhaled toxic smoke in a room where wiring was burning. Ex. 92 at 22:21-23:10. He later developed a lung condition as a result of breathing

the toxic smoke. *Id.* Mr. Harrison did not cease his rescue activities for 96 hours. Ex. 92 at 20:15-18, 23:17-24:10.

Upon returning to Naval Station in Norfolk, Virginia, Mr. Harrison's permanent injuries were discovered when he was unable to pass a physical readiness test. Ex. 92 at 24:17-25:15. Mr. Harrison was subsequently diagnosed with the compression of ten lower vertebrae, flattened arches in his feet, damage to the tympanic membrane in his right ear, a separated shoulder and damage to his rotary cuff, and a severe concussion. Ex. 92 at 19:9-20:1, 25:2-15, 28:13-24.

Aside from the physical injuries, he also had recurring nightmares, mood swings, and severe headaches. Ex. 92 at 25:16-25. Ultimately, as a result of his physical and emotional condition, he was medically discharged from the Navy. Ex. 92 at 26:19-27:4. Currently, Mr. Harrison endures constant physical pain in his knees, shoulders, lower back, and feet. Ex. 92 at 28:8-29:7. Mr. Harrison testified that the emotional impact of these injuries is still present today. Ex. 92 at 29:8-31:16. His symptoms include anxiety, anger, flashbacks, and nightmares. Ex. 92 at 31:17-32:23.

Dr. Hernandez-Cardenache an expert clinical psychologist, further provided his expert opinion that Mr. Harrison's symptoms are consistent with chronic post-traumatic stress disorder. Ex. 106 at 36:14-39:4.

Keith Lorensen

Keith Lorensen was born on September 28, 1967, in St. Paul, Minnesota. Ex. 90 at 5:13-16. On October 7,

1985, Mr. Lorensen enlisted in the Navy. Ex. 90 at 6:8-25. He intended to remain in the Navy as his career. Ex. 90 at 12:12-18. In 1998, Mr. Lorensen was assigned to the Cole. Ex. 90 at 14:12-17.

At the time of the attack, Mr. Lorensen was in the chief petty officer's mess, midship on the port side very near to the point of impact, conversing with another crew member. Ex. 90 at 14:24-16:6. The blast flung him 30 feet through the air and caused him to black out. Ex. 90 at 16:7-18:8. When he regained consciousness, he found himself lying across the mess underneath debris from the galley equipment. *Id.* His right femur was broken four inches above the knee and had been completely folded behind his back so that his foot was now located near his head. Ex. 90 at 19:6-20:14. Mr. Lorensen also sustained multiple contusions on each of his legs, a lip laceration, and a broken wrist in the blast. Ex. 90 at 18:15-20:25, 30:13-31:9. After noticing bleeding from his right leg, he used his belt as a tourniquet to stop the bleeding from his femoral artery, and continued applying the pressure until, after approximately 40 minutes, he was removed from the space by other sailors. Ex. 90 at 18:9-20:14.

After being removed from the mess hall, Mr. Lorensen was given morphine and taken to the top of the ship with other injured sailors. Ex. 90 at 22:18-23:4. While waiting for additional medical treatment, Mr. Lorensen witnessed a fellow sailor being declared dead. Ex. 90 at 23:5-15. He was then taken to a hospital in Yemen for further treatment. Ex. 90 at 27:11-18. He blacked out again in the hospital and only regained consciousness after surgery had been performed on his broken leg. Ex. 90 at 29:1-6. When

he awoke, his leg was in traction, with makeshift metal components affixed to open wounds in his leg held in place by a piece of concrete attached via twine as a counterweight. Ex. 90 at 30:13-31:16. The laceration in his lip was subsequently stitched without any anesthesia. *Id.*

The next day he was flown to Germany where he received further medical treatment before ultimately returning to Virginia. Ex. 90 at 32:13-21. After returning to the United States, seven months passed before he could put any weight on his right leg. Ex. 90 at 40:10-41:16. He can no longer squat down and has lost range of motion in his right leg. Ex. 90 at 43: 21-44:7. In addition to physical injuries, Mr. Lorensen also sustained psychological damage as a direct result of the incident. Ex. 90 at 46:1-4. Specifically, he experienced increased irritability and could not sleep through the night for a number of years. Ex. 90 at 46:5-48:17. Mr. Lorensen also experienced flashbacks and emotional outbursts. *Id.* He was subsequently diagnosed with post traumatic stress disorder. Ex. 90 at 46:1-17. The Department of Veterans Affairs has assigned him a 40% disability rating. Ex. 90 at 60:16-61:1.

Dr. Rene Hernandez-Cardenache provided his expert opinion that Mr. Lorensen's symptoms are consistent with chronic post-traumatic stress disorder. Ex. 106 at 74:6-79:21.

John Buckley III

John Buckley III was born on August 10, 1979. Ex. 99 at 4:18-21. He enlisted in the Navy on May 28, 1997, Ex. 99 at 5:7-8, intending to remain in the service for the duration of his career. Ex. 99 at 5:15-

21. Prior to the terrorist attack, he had been serving on the Cole for approximately three years. Ex. 99 at 6:18-21.

At the time of the bombing, Mr. Buckley was in a passageway approximately ten feet from the point of impact. Ex. 99 at 12:25-13:3. The explosion flung him through the air to the other end of the passageway, where he had a concussion and lost consciousness. Ex. 99 at 13:4-18. After coming to, Mr. Buckley moved toward the area of the blast in an effort to assist injured sailors. Ex. 99 at 13:22-14:17. Mr. Buckley assisted in the medical care and evacuation of other injured sailors for several hours, until he collapsed due to his own injuries. *Id.*

As a result of the blast, Mr. Buckley suffered fractures to both knees, hearing loss, and severe lower back trauma. Ex. 99 at 8:25-10:13. Mr. Buckley continues to suffer from his physical injuries. Ex. 99 at 9:25-10:3. He cannot lift over 100 pounds, has undergone two back surgeries, and continues to receive treatment for his knee injuries. *Id.*; Ex. 99 at 17:16-18:7. Mr. Buckley has also been diagnosed with post-traumatic stress disorder. Ex. 99 at 8:25-10:13. He continues to experience nightmares and headaches, is prone to aggressive behavior, and hears voices. Ex. 99 at 19:3-12. On May 29, 2001, Mr. Buckley was honorably discharged from the Navy. Ex. 99 at 7:13-25. Mr. Buckley was assigned a 100% disability rating by the VA. Ex. 99 at 8:14-21.

According to Dr. Hernandez-Cardenache, Mr. Buckley's symptoms are consistent with post-traumatic stress disorder. Ex. 106 at 21:17-25:5.

Margaret Lopez

Margaret Lopez was born on December 26, 1970. Ex. 96 at 6:14-16. She enlisted in the Navy. Ex. 96 at 7:6-7. It was Mrs. Lopez's intention to remain in the Navy as a career. Ex. 96 at 7:10-16. In July 1998, Mrs. Lopez was assigned to the Cole as a gas turbine systems mechanic. Ex. 96 at 10:23-11:8.

At the time of the bombing, Mrs. Lopez was supervising work being performed in the oil lab. Ex. 96 at 14:12-22. The bomb blast impacted the ship approximately 20 feet from her location and immediately killed one of the sailors working with her in the oil lab at that time. Ex. 96 at 15:21-16:13. As a direct result of the blast, Mrs. Lopez sustained burns to her face, neck, legs, and arms; her ear drums were ruptured; and several discs in her spine were ruptured. Ex. 96 at 19:25-20:13. After the blast, the oil lab began to fill with smoke and water. Ex. 96 at 16:25-17:14, 18:8-18. In order to escape the area, she freed herself from debris and jumped into the sea through the hole created by the blast. Ex. 96 at 18:20-25. She remained in the water for over an hour before being pulled to safety. Ex. 96 at 21:8-19.

Mrs. Lopez was transferred to a hospital in Yemen before being sent to Germany for further treatment. Ex. 96 at 23:15-24:7. She remained in Germany for two weeks under the care of a burn specialist. Ex. 96 at 24:11-18. While waiting to get a skin graft, Mrs. Lopez developed pneumonia. Ex. 96 at 24:19-25:1. It took approximately two years for her burns to fully heal. Ex. 96 at 25:25-26:15. Mrs. Lopez also underwent an eardrum replacement surgery. *Id.*

Since the bombing, Mrs. Lopez has experienced insomnia, mood swings and nightmares, and has been diagnosed with post-traumatic stress disorder. Ex. 96 at 34:5-20; 29:9-30:7.

As a result of her medical condition, Mrs. Lopez retired from the Navy on November 4, 2004. Ex. 96 at 27:3-28:1. At the time, she was prescribed antidepressants and pain medication for her injuries. Ex. 96 at 29:9-30:7. Based upon her injuries, she has been assigned a 100% disability rating by the Department of Veterans Affairs. Ex. 96 at 30:25-31:15.

Dr. Rene Hernandez-Cardenache testified that Mrs. Lopez's symptoms are consistent with chronic post-traumatic stress disorder. Ex. 106 at 59:6-61:25.

Edward Love

Edward Love was born on October 4, 1979. Ex. 94 at 5:16-19. He enlisted in the Navy on March 30, 2000, Ex. 94 at 6:4-5, intending to spend his career in the Navy. Ex. 94 at 17:22-25. His first assignment was onboard the Cole, which began in approximately August 2000. Ex. 94 at 6:8-10.

When the attack occurred, Mr. Love was midship on the port side. Ex. 94 at 8:12-14. As a result of the blast, he was thrown to the ground and suffered a ruptured eardrum. Ex. 94 at 8:22-9:8. Mr. Love immediately began to assist the injured crew and to repair damage to the ship to prevent further flooding. Ex. 94 at 9:17-10:25. In doing so, he witnessed many sailors who were severely injured or had died because of the attack. *Id.*

After three or four hours, Mr. Love left the ship and was transferred to the hospital in Yemen. Ex. 94 at 10-21. The next day, Mr. Love was moved to Germany where he received further treatment. Ex. 94 at 14:2-12. Since that day, Mr. Love has not been able to pass a hearing test for his right ear. Ex. 94 at 14:13-19. The VA has assigned a 10% disability rating for this injury. Ex. 94 at 14:20-24. After returning to the United States, Mr. Love was stationed at a naval base in Norfolk, Virginia. Ex. 94 at 16:16-25.

While stationed in Norfolk, Mr. Love was diagnosed with post traumatic stress disorder. Ex. 94 at 17:2-9. The lasting effects from the bombing have caused Mr. Love's personality to change, with symptoms including problems with anxiety, mood swings, lack of appetite, and trouble sleeping. Ex. 94 at 18:18-23. As a result of these continuing issues, on March 3, 2003, he was discharged from the Navy. Ex. 94 at 17:10-21. Mr. Love continues to receive treatment for his symptoms to this day. Ex. 94 at 19:14-20:25.

According to Dr. Hernandez-Cardenache, Mr. Love's symptoms are consistent with chronic post-traumatic stress disorder and co-morbid mood disorder. Ex. 106 at 62:1-65:4.

Robert McTureous

Robert McTureous, born on May 25, 1972, Ex. 89 at 5:13-16, enlisted in the Navy. Ex. 89 at 5:23-24. It was his intention to have a career in the Navy. Ex. 89 at 5:25-6:5. In August 2000, Mr. McTureous joined the crew of the Cole. Ex. 89 at 9:11-24.

On the day of the attack, Mr. McTureous was in the oil lab, with Margaret Lopez, preparing to relieve other sailors who were involved in the refueling process. Ex. 89 at 13:2-14. The blast occurred in close proximity to the oil lab, and the room began to fill with water. Ex. 89 at 13:20-15:8. Because the exit door of the oil lab had been damaged by the blast, Mr. McTureous escaped by climbing through the wreckage and jumping through the hole in the ship that had been caused by the explosion. *Id.*; Ex. 89 at 16:3-16.

After being rescued from the water by his shipmates, Mr. McTureous was taken to a hospital in Yemen where he remained overnight until being transferred to Germany and then Portsmouth Naval Hospital for further treatment. Ex. 89 at 18:5-19:13. After the bombing, Mr. McTureous was discharged from the Navy because he could not face "the reality of going back to sea." Ex. 89 at 23:18-24:4.

As a result of the blast, Mr. McTureous sustained severe, permanent, painful, life long injuries including two ruptured eardrums, second degree burns on his face, a fractured finger and shrapnel in his arms. Ex. 89 at 15:5-8, 20:4-13, 24:5-25:11. Currently, Mr. McTureous has significant hearing loss in both ears. Ex. 89 at 25:8-11. Due to his physical injuries, the Department of Veterans Affairs has assigned him a 70% disability rating. Ex. 89 at 25:12-15, 39:14-40:6.

In addition to severe physical injuries, Mr. McTureous was diagnosed with post-traumatic stress disorder in 2002. Ex. 89 at 26:21-29:5. The psychological effect of the blast has caused Mr.

McTureous to suffer from flashbacks, nightmares, and a fear of crowds. *Id.*; Ex. 89 at 30:8-37:15. Prior to the bombing, Mr. McTureous was outgoing, but now describes himself as reserved, scared, on edge, and shy. Ex. 89 at 27:16-22.

Dr. Rene Hernandez-Cardenache testified that Mr. McTureous' symptoms are consistent with chronic post-traumatic stress disorder and reduced cognitive functioning as a result of the attack. Ex. 106 at 25:6-28:1.

David Morales

David Morales was born on February 19, 1978 and enlisted in the Navy in July 1999. Ex. 93 at 6:8-12. It was his intention to remain in the Navy for his career. Ex. 93 at 6:20-25. After graduating from basic training, Mr. Morales was assigned to the Cole as a boatswain's mate. Ex. 93 at 6:16-25.

On the day of the bombing, Mr. Morales had just finished his morning duties and had gone to his room to rest. Ex. 93 at 14:17-15:1. He was lying in his rack approximately 30 feet from the point of impact when he felt the explosion rock the ship. Ex. 93 at 15:10-25. The force of the blast caused him to impact the ceiling above his rack and then fall to the floor. *Id.* He immediately went to the top of the ship to assist his injured shipmates, encountering many severely injured and dead sailors on his way. Ex. 93 at 16:3-25:21. In the rescue efforts, Mr. Morales attempted to perform CPR on a fellow sailor who ultimately died. *Id.* Mr. Morales was later commanded to stand security on the deck, which he did for the next three days. *Id.*

As a result of the blast, Mr. Morales suffered whiplash in his neck. Ex. 93 at 26:8-27:4. Three weeks after the incident he was diagnosed with post-traumatic stress disorder, and continues be treated for this condition to this day. Ex. 93 at 28:6-29:18, 33:5-8. Mr. Morales' symptoms include irritability, nervousness and anxiety, and flashbacks. Ex. 93 at 36:8-39:5. His condition caused Mr. Morales to be discharged from the Navy in 2002. Ex. 93 at 10:19-22, 11:18-24.

Dr. Rene Hernandez-Cardenache provided his expert opinion that Mr. Morales's symptoms are consistent with post-traumatic stress disorder. Ex. 106 at 33:14-36:13.

Gina Morris

Gina Morris was born on October 15, 1980. Ex. 88 at 3:22-25. She enlisted in the Navy in 1998. Ex. 88 at 4:13-18. She intended to remain in the Navy for her career. Ex. 88 at 4:24-5:1. The Cole was her first assignment. Ex. 88 at 5:15-17.

At the time of the attack, Ms. Morris was on the irside of the ship moving towards the oil lab. Ex. 88 at 7:22-8:2. Immediately upon hearing the explosion, she went toward the oil lab to help her shipmates who had been injured in the blast. Ex. 88 at 7:22-10:9. For over five hours, Ms. Morris assisted in the medical treatment of sailors injured in the blast. *Id.* Ms. Morris then left the ship to escort injured sailors to a hospital in Yemen. *Id.*

Although she did not sustain any physical injuries, Ms. Morris has suffered severe emotional distress as a direct result of the attack. Ex. 88 at 10:10-19:22.

Upon going to the aid of her shipmates, Ms. Morris witnessed the horrific aftermath of the bombing. Ex. 88 at 8:24-10:9. Ms. Morris left the Navy, in August 2001, as a direct result of the attack. Ex. 88 at 23:1-11. She is currently undergoing treatment for her ongoing symptoms including anger, sleep issues, high anxiety, flashbacks and guilt. Ex. 88 at 10:10-19:22.

Dr. Hernandez-Cardenache testified that Ms. Morris' symptoms are consistent with post-traumatic stress disorder. Ex. 106 at 65:5-67:24.

Rubin Smith

Rubin Smith was born on July 26, 1979, in Albemarle, North Carolina. Deposition of Tracey Smith, ("D.E. 36"), Supplemental Proposed Findings of Fact ("Supp. Ex. 1") at 6:21-7:3. In 1997, Mr. Smith enlisted in the Navy. D.E. 36, Supp. Ex. 1 at 7:16-18. Mr. Smith loved his experience in the Navy and only left the Navy because of the trauma he experienced in the bombing of the U.S.S. Cole. Supp. Ex.1 at 14:2-22.

In October 2000, Mr. Smith was serving onboard the U.S.S. Cole as an operations specialist. D.E. 36, Supp. Ex. 1 at 8:1-13. At the time of the bombing, Mr. Smith was assigned to work in the ship's galley, which was near the epicenter of the blast. D.E. 36, Supp. Ex. 1 at 10:1-16. However, a shipmate, who was a close friend, volunteered to take his shift. *Id.* Mr. Smith's friend was in the galley as Mr. Smith's replacement at the time of the explosion and was killed. *Id.* Mr. Smith was in his quarters at the time and was thrown from his bunk to the deck by the force of the blast. The fall caused him to dislocate his ankle and suffer a torn tendon and nerve damage in his lower leg. D.E. 36, Supp. Ex. 1 at 11:20-25. As a

result of his injuries, Mr. Smith was evacuated from the ship to a military treatment facility. D.E. 36, Supp. Ex. 1 at 11:3-8. Mr. Smith suffered scarring as a result of his injuries and received treatment for ongoing pain up until the time of his death. D.E. 36, Supp. Ex. 1 at 11:9-10 and 22; 13:19-23.

As a result of the blast, Mr. Smith suffered severe emotional distress, which caused him to develop post-traumatic stress disorder. D.E. 36, Supp. Ex. 1 at 12:1-13. For the rest of his life, Mr. Smith was plagued by feelings of guilt over the death of the shipmate who had volunteered to take his shift in the galley and other friends who were also lost onboard. D.E. 36, Supp. Ex. 1 at 10:10-16. His symptoms, which included depression and anger, resulted in problems with maintaining personal relationships. D.E. 36, Supp. Ex. 1 at 14:9-15; 16:10-18. In 2003, Mr. Smith, who believed that he was no longer emotionally capable of serving, was discharged from the Navy. D.E. 36, Supp. Ex. 1 at 14:9-15; 7:19-21.

Mr. Smith was diagnosed with post-traumatic stress disorder and was receiving psychological treatment at the time of his death. D.E. 36, Supp. Ex. 1 at 14:9-15; 16:10-18. As a result of his physical and mental injuries, Mr. Smith was assigned a 50% disability rating by the Department of Veterans Affairs. D.E. 36, Supplemental Ex. 2 at 2.

Martin Songer, Jr.

Martin Songer was born on August 3, 1970. Ex. 102 at 4:24-5:4. On June 11, 1991, Mr. Songer enlisted in the Navy. Ex. 102 at 6:19-22. In 1998, Mr. Songer was assigned to the Cole as a Second Class Boatswain Mate. Ex. 102 at 10:7-24. At the time of

the bombing, Mr. Songer was in the boatswain workshop in the aft part of the ship on the port side, approximately 150 feet away from the area of direct impact. Ex. 102 at 17:8-23. The blast threw Mr. Songer against a bulkhead. Falling equipment bruised and lacerated him. Ex. 102 at 19:11-19. Mr. Songer witnessed many dead and severely injured shipmates. Ex. 102 at 23:16-24:3, 25:20-27:9.

These events impacted Mr. Songer emotionally. Ex. 102 at 23:16-24:3, 25:20-27:9. As a direct result of the bombing, he now suffers from anxiety and temper control issues. Ex. 102 at 34:7-12. A few months after the terrorist attack, Mr. Songer decided to leave the Navy. Ex. 102 at 34:20-35:5.

Dr. Hernandez-Cardenache further provided his expert opinion that Mr. Songer's symptoms are consistent with moderate to severe emotional distress. Ex. 106 at 71:10-73:22.

Jeremy Stewart

Jeremy Stewart was born on March 5, 1981. Ex. 95 at 5:7-10. He enlisted in the Navy on February 9, 2000. Ex. 95 at 7:21-23. It was Mr. Stewart's intention to remain in the Navy for the full duration of his career. Ex. 95 at 5:25-6:4. Two weeks after he completed basic training, Mr. Stewart was assigned to the Cole as a Hull Maintenance Technician Fireman. Ex. 95 at 7:4-20.

When the bomb exploded, Mr. Stewart was thrown to the ground and suffered a concussion, losing consciousness for five to fifteen minutes. Ex. 95 at 9:12-10:18. He was removed from the debris by other sailors, taken to the flight deck on the top of the ship,

and evacuated to a hospital in Yemen. Ex. 95 at 10:25-11:2. He again lost consciousness and did not come to until approximately one week later, after having been transported to Germany. Ex. 95 at 11:3-7.

As a result of the blast, Mr. Stewart suffered multiple fractures and shattered bones in his arms and legs, a gastric rupture, internal bleeding, and shrapnel wounds. Ex. 95 at 10:19-24. His injuries caused permanent scarring on his forearms, knees, legs, and stomach. Ex. 95 at 11:8-14. He is no longer able to run and has lost range of motion in his right shoulder, and endures constant pain on a daily basis. Ex. 95 at 11:15-20, 13:5-11. As a result of the attack, Mr. Stewart also exhibits a variety of emotional symptoms, including sadness, flashbacks, nightmares, irritability, and high anxiety. Ex. 95 at 15:13-16:12, 17:21-23:8. In December 2003, the Navy discharged Mr. Stewart was discharged due to his injuries. Ex. 95 at 13:14-14:4. The Department of Veterans Affairs assigned Mr. Stewart a 60% disability rating. Ex. 95 at 11:21-24.

According to Dr. Hernandez-Cardenache, Mr. Stewart's symptoms are consistent with post-traumatic stress disorder and a traumatic brain injury. Ex. 106 at 39:7-41:25.

Kesha Stidham

Kesha Stidham was born on June 12, 1981. Ex. 100 at 4:2-5. She enlisted in the Navy in July 1999, Ex. 100 at 4:18-21, and intended to remain in the Navy for her career. Ex. 100 at 6:22-24. Ms. Stidham was assigned to the Cole on October 30, 1999. Ex. 100 at 5:20-22.

The center of the explosion was approximately 50 or 60 feet away from her location. Ex. 100 at 8:23-9:5. Several sailors standing within only a few feet of her were killed by the blast. Id. The explosion caused Ms. Stidham to be thrown back ten feet through the air. Ex. 100 at 9:6-10:3. She suffered large thigh and leg bruises, fractured ribs, burns to her neck, and deep lacerations to her cheek, jawline, chin, and right ear. *Id.* She was initially treated for her injuries on the vessel. Ex. 100 at 11:24-12:19. She saw other sailors injured and lying on the deck, some covered in soot, and others screaming in pain. *Id.*

After being transported off the Cole, Ms. Stidham was taken to a hospital in Yemen. Ex. 100 at 15:8-18. Ms. Stidham received 15 stitches in her face without anesthesia. Ex. 100 at 15:19-16:24. She described the pain of the stitching as tremendous. Ex. 100 at 16:4-10. Ms. Stidham had to undergo re-stitching of the wounds on her face in Germany. Ex. 100 at 17:12-15, 18:6-19:1.

Upon returning to the U.S., Ms. Stidham was placed on leave for 30 days, then returned to service on the U.S.S. Whitney. Ex. 100 at 23:9-12, 25:23-26:5. While onboard, she suffered an anxiety attack. Ex. 100 at 26:17-27:23. She was ultimately removed from the ship, placed on limited duty and discharged from the Navy. Ex. 100 at 31:6-12, 32:24-33:24. The Department of Veterans Affairs has given her a 40% disability rating due to her injuries. Ex. 100 at 54:18-22.

Ms. Stidham received psychological treatment for her emotional distress caused by the attack and was diagnosed with post-traumatic stress disorder. Ex.

100 at 28:4-22. Her symptoms, such as anger and anxiety, have resulted in problems with maintaining personal relationships and employment. Ex. 100 at 33:20-35:1, 37:5-38:2. Ms. Stidham still experiences panic attacks on a daily basis. Ex. 100 at 42:23-43:9.

Dr. Rene Hernandez-Cardenache provided his expert opinion that Stidham's symptoms are consistent with chronic post-traumatic stress disorder and panic disorder as a result of the attack. Ex. 106 at 28:2-33:13.

Aaron Toney

Aaron Toney was born on March 21, 1979 and enlisted in the Navy on December 23, 1997. Ex. 105 at 7:8-10. It was Mr. Toney's intention to remain in the Navy as his career. Ex. 105 at 7:17-22. In April 1998, Mr. Toney was assigned to the Cole as a fireman recruit. Ex. 105 at 9:1-13.

At the time of the bombing, Mr. Toney had just been relieved from his post in the engine room when he heard a loud explosion. Ex. 105 at 13:2-10. Mr. Toney immediately changed into his firefighting ensemble. Ex. 105 at 13:11-14:15. As he moved around the ship, he witnessed severely injured and dead sailors. *Id.* For 72 hours, Mr. Toney was involved in the medical care of his fellow shipmates. Ex. 105 at 17:22-20:8. Mr. Toney also assisted in repairing the damage to the ship for three weeks after the incident, and was among the last of the crewmembers to leave the vessel. Ex. 105 at 20:20-21:9.

Although Mr. Toney was not physically injured in the bombing, he has been diagnosed with post-traumatic stress disorder. Ex. 105 at 23:18-24:23. His

symptoms include difficulty sleeping, nightmares, memory problems, anxiety, and feelings of emptiness and distrust. Ex. 105 at 30:4-22, 36:16-37:21, 40:2-41:21, 44:11-48:17, 49:21-58:25. These symptoms ultimately caused him to leave the Navy. Ex. 105 at 28:18-29:14. He has been assigned a 30% disability rating by the Department of Veterans Affairs. Ex. 105 at 61:19-62:12.

Eric Williams

Eric Williams was born on November 12, 1980. Ex. 98 at 4:13-15. On June 16, 1999, he enlisted in the Navy. Ex. 98 at 5:3-6. It was Mr. Williams' intention to remain in the Navy as his career. Ex. 98 at 7:14-22. In 2000, Mr. Williams was assigned to the Cole as a Tomahawk technician. Ex. 98 at 8:13-9:13. His duties included maintenance and operation of the Tomahawk missile system. *Id.*

At the time of the bombing, Mr. Williams was eating in the mess hall, in the center of the ship. Ex. 98 at 9:25-11:13. The explosion occurred directly adjacent to his location. *Id.* Shrapnel from the explosion lacerated the top of his head, which caused him to suffer a concussion and drift in and out of consciousness. *Id.* After the explosion, he witnessed sailors die from their injuries and others who had been severely injured. Ex. 98 at 18:3-23. Mr. Williams was able to move to the top of the ship, and assisted in the treatment and evacuation of other injured sailors until he again fell unconscious. Ex. 98 at 21:7-22:6. Mr. Williams was then removed to a hospital in Yemen where he received stitches for the wound to his head. Ex. 98 at 23:3-12. In the U.S., he was diagnosed with a severe concussion. Ex. 98 at 29:20-

24, 33:4-9. To this day, Mr. Williams has trouble remembering events from his childhood. Ex. 98 at 33:10-23. The bombing continues to have a profound effect on Mr. Williams. Mr. Williams has been diagnosed with severe post-traumatic stress disorder and has experienced nightmares, extreme anger, and issues maintaining relationships, symptoms which he did not experience prior to the bombing. Ex. 98 at 69:13-75:21. For several years, he struggled with alcohol abuse. Ex. 98 at 35:13-36:13, 40:15-44:4, 46:2-48:2, 50:1-51:16, 54:13-56:19, 67:1-24.

Dr. Hernandez-Cardenache provided expert opinion that Mr. Williams' symptoms are consistent with chronic post-traumatic stress disorder and anxiety disorder. Ex. 106 at 42:5-50:7.

Carl Wingate

Carl Wingate was born on April 15, 1979. He enlisted in the Navy in August 31, 1998, Ex. 101 at 7:7-9, 8:20-24, intending to stay in the Navy for the remainder of his career. Ex. 101 at 7:10-17.

At the time of the bombing, Mr. Wingate was in his rack. Ex. 101 at 10:16-23. The impact of the blast caused him to be thrown from his rack and land on his head and shoulder. *Id.* Shortly thereafter, he made his way to the top of the ship and began assisting in the medical treatment of sailors injured in the blast and the transport of injured sailors from the ship to mainland. Ex. 101 at 10:24-12:13. Mr. Wingate provided medical attention to eleven injured sailors, two of which died. *Id.* One of the sailors who died was his bunkmate. *Id.*

As a result of the bombing, Mr. Wingate suffered impingement of both shoulders, herniated discs in his back, hearing loss, memory loss, and post-traumatic stress disorder. Ex. 101 at 13:8-21. Since the bombing, the physical effects of Mr. Wingate's injuries have become progressively more severe. Ex. 101 at 14:1-16:16. He continues to experience significant pain in his shoulders, neck, and back, and his range of motion is limited. *Id.* Post-traumatic stress disorder symptoms include irritability, anxiety, flashbacks, and nightmares. Ex. 101 at 30:11-33:1, 33:19-37:6. The emotional damage from the bombing has caused his personal relationships to suffer and led to a divorce from his wife. Ex. 101 at 21:7-22:3. In 2007, Mr. Wingate was discharged from the Navy as a result of the injuries he sustained from the bombing. Ex. 101 at 19:16-25, 20:21-21:6. The Department of Veterans Affairs assigned him a 60% disability rating. Ex. 101 at 19:2-5.

According to Dr. Hernandez-Cardenache, Mr. Wingate's symptoms are consistent with post-traumatic stress disorder. Ex. 106 at 50:8-55:5.

2. Plaintiffs Who are Spouses of Plaintiffs on the Cole During the Attack

Spouses of the injured sailors allege IIED and injury in the form of mental anguish and loss of consortium. They seek punitive and compensatory damages, including loss of solatium. Their claims include the following individualized injuries.

Andy Lopez

Andy Lopez is the spouse of Margaret Lopez, Ex. 97 at 5:2-6, and a former Navy master chief. Ex. 97 at

5:7-11. He married Margaret Lopez on November 8, 1996. Ex. 97 at 6:19-20. Mr. and Mrs. Lopez have two children together. Ex. 97 at 7:9-14.

On the day of the bombing, Mr. Lopez learned of the attack on the Cole from the morning news. Ex. 97 at 8:6-15. At noon that day, the Navy officially informed him of the incident and asked him to proceed to a local naval base for further information. Ex. 97 at 8:16-18. Mr. Lopez did not learn that his wife survived the blast until the next day when he spoke with her on the telephone. Ex. 97 at 9:3-19. Mr. Lopez immediately flew to meet her in Germany, where she was being treated under the care of a burn specialist. Ex. 97 at 9:23-10:4. When he arrived, Mrs. Lopez was in a medically-induced coma. He stayed there with her until her return to the United States. Ex. 97 at 10:13-11:8, 12:4-21.

The bombing and resultant injuries to his wife have affected Mr. Lopez psychologically. Ex. 97 at 17:14-18:22. Indeed, he has been diagnosed with post-traumatic stress disorder and has entered into counseling. Ex. 97 at 18:23-19:19. Dr. Hernandez-Cardenache, testifies that Mr. Lopez's symptoms are consistent with chronic post-traumatic stress disorder. Ex. 106 at 55:15-59:5.

Lisa Lorensen

Lisa Lorensen is the spouse of Keith Lorensen, a sailor who was injured during the bombing of the Cole. Ex. 91 at 6:12-13. She was married to Mr. Lorensen on October 23, 1993. Ex. 91 at 6:14-15. The Lorensens have two children together. Ex. 91 at 6:16-20. Although Mrs. Lorensen was not enlisted in the Navy, she served as the Ombudsman of the Cole,

serving as a liaison between the families and the commanding officer of a ship. Ex. 91 at 6:21-23.

On the day of the bombing, Mrs. Lorensen received a phone call advising her that something significant had occurred on the ship. Ex. 91 at 11:3-12:11. However, no specific details were provided. *Id.* She was advised to proceed to a naval facility in order to obtain more information. *Id.* While on her way to the location, Ms. Lorensen received a phone call from her mother advising her that the Cole had been attacked. *Id.* While waiting at the facility, Ms. Lorensen witnessed the Naval officers present at the location advising sailors' family members of the death or injuries suffered by their relatives. *Id.* After approximately twelve hours, she was advised that Keith Lorensen was alive, but injured. Ex. 91 at 13:19-14:15:5.

Approximately 24 hours later, Mrs. Lorensen had the opportunity to speak with her husband. Ex. 91 at 15:6-21. Mr. Lorensen told her that he did not know whether he would be able to walk again, but would be coming home. Ex. 91 at 15:19-16:4. Mrs. Lorensen then flew to Germany to see her husband. Ex. 91 at 16:5-14. When they returned to Virginia, Mrs. Lorensen had tremendous feelings of guilt and sadness as a result of her husband's injuries and the death and injury of the other sailors on the vessel. *Id.* The emotional impact of the events caused a strain in their marriage. Ex. 91 at 20:9-21:15.

Dr. Rene Hernandez-Cardenache, an expert clinical psychologist, further provided his expert opinion that Mrs. Lorensen suffered from acute emotional distress

as a direct result of the bombing. Ex. 106 at 79:22-82:3.

Shelly Songer

Shelly Songer is the spouse of plaintiff Martin Songer, who was injured during the bombing of the Cole. Ex. 103 at 5:7-9. Mrs. Songer learned of the bombing through a telephone call from her mother-in-law. Ex. 103 at 8:23-9:2. Twelve hours later, she learned that her husband survived the bombing. Ex. 103 at 9:6-15. Upon returning home, the continuing emotional effect of the terrorist attack on Mr. Songer has adversely affected their marriage. Ex. 103 at 13:4-15:16.

Dr. Hernandez-Cardenache testifies that Ms. Songer's symptoms are consistent with severe emotional distress. Ex. 106 at 67:25-71:9.

IV. CONCLUSIONS OF LAW

A. Jurisdiction is Proper and Sudan Is Not Immune from Suit

The Court finds that the plaintiffs have met FSIA's multi-factor test for jurisdiction and waiver of immunity discussed above, as set forth above. *See* 28 U.S.C. § 1605(A)(a)(1); *Owens*, 2011 WL 5966900, at *17. First, the sole remedy plaintiffs seeks is "money damages." 28 U.S.C. § 1605(A)(a)(1). Second, Sudan is a foreign state. *Id.* Third, the evidence presented to the Court establishes that plaintiffs suffered physical injury form the attack. *Id.* Fourth, the evidence presented shows that Sudan aided Al Qaeda in executing the bombing, and this harm was a direct result of Sudan's of provision of material support. *Id.* On the evidence presented, there is "some reasonable

connection between the act or omission of the defendant and the damages which the plaintiff has suffered." *Valore*, 700 F. Supp. 2d at 66 (internal quotations omitted).

As well, FSIA section 1605A(a)(2) requirements have been met. Sudan has been designated a state sponsor of terrorism since 1993, and claimants are all U.S. nationals, both statutory requirements. 28 U.S.C. § 1605A(a)(2).[11] Thus, for purposes of this action, FSIA does not protect Sudan with immunity from suit, and this Court has jurisdiction over plaintiffs' claims.

B. Plaintiffs Have Established a Cause of Action and Theory of Liability

The same facts as to material support and causation support plaintiffs' cause of action and theory of liability. Plaintiffs have shown that Sudan's support of Al Qaeda has a "reasonable connection" to the damages they suffered. *Id.* As described in detail below, they also demonstrate the other elements of the torts they allege. *See Murphy*, 740 F. Supp. 2d at 72. In keeping with the prevailing approach in this Circuit, *see id.*; *Bettis*, 315 F.3d at 333, the Court apply the generally accepted principles of tort law. The Court addresses first the claims of the sailors

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[11] As for the § 1605A(a)(2)(A)(iii) arbitration requirement, plaintiffs were not required to extend an offer to arbitrate because the FSIA only requires as much when the alleged terrorist act occurred in the foreign state against which the claim is brought. *Id.* Even though the attack did not take place in Sudan, the plaintiffs sent Sudan an offer, to which it did not respond. *See* Notice of Amended Offer to Arbitrate, Oct. 11, 2010 [Dkt. # 6].

who were on the Cole at the time of the attack and then the claims of their spouses who were not present during the attack.

1. Harm to Plaintiffs Injured on the Cole

a. Assault

Sudan is liable to plaintiffs for the assault they allege if, when it provided material support to Al Qaeda, (1) it acted "intending to cause a harmful contact with . . . , or an imminent apprehension of such a contact" by, those attacked and (2) those attacked were "thereby put in such imminent apprehension." RESTATEMENT (SECOND) OF TORTS § 21(1); *accord Murphy*, 740 F. Supp. 2d at 73 (citing *Valore*, 700 F. Supp. 2d at 76). Here, the record shows that Sudan acted with intent to cause harmful contact and the immediate apprehension thereof: acts of terrorism are, by their very nature, intended to harm and to terrify by instilling fear of further harm. Accepting these plaintiffs' uncontroverted assertions that they did, in fact, fear such harm because of the attack, the Court concludes that Sudan is liable for assault.

b. Battery

Likewise, Sudan is liable for battery. It acted "intending to cause a harmful or offensive contact with . . . , or an imminent apprehension of such a contact" by, those attacked and (2) "a harmful contact with" those attacked "directly or indirectly result[ed]." RESTATEMENT (SECOND) OF TORTS § 13; *accord Murphy*, 740 F. Supp. 2d at 74 (citing *Valore*, 700 F. Supp. 2d at 76). Harmful contact is that which results in "any physical impairment of the condition of another's body, or physical pain or illness."

RESTATEMENT (SECOND) OF TORTS § 15. Accepting plaintiffs' uncontroverted assertions that they did, in fact, suffer physical injury from the attack on the Cole, the Court concludes Sudan is liable to certain plaintiffs for battery.

c. Intentional Infliction of Emotional Distress

Sudan is liable for IIED if it (1) "by extreme and outrageous conduct" (2) "intentionally or recklessly" (3) "causes severe emotional distress to another." RESTATEMENT (SECOND) OF TORTS § 46(1). Further, "if bodily harm to the other results from it, for such bodily harm." *Id.* Here, plaintiff-sailors have proven each element. In the FSIA-terrorism context, courts have held that "[a]cts of terrorism are by their very definition extreme and outrageous and intended to cause the highest degree of emotional distress." *Belkin v. Islamic Republic of Iran,* 667 F. Supp. 2d 8, 22 (D.D.C. 2009) (citing *Stethem v. Islamic Republic of Iran,* 201 F. Supp. 2d 78, 89 (D.D.C. 2002)). Based on the evidence presented, the Court concludes that Sudan's support of the Cole bombing was both intentional and reckless and caused plaintiffs emotional distress. It is therefore liable to plaintiffs for IIED.

2. Harm to Spouses of Sailors

Spouses of injured sailors have brought IIED claims, alleging that extreme and outrageous conduct directed at their spouses caused these plaintiffs severe emotional distress. According to the second Restatement of Torts, Sudan is liable in these cases under such claims if it (1) engaged in extreme and outrageous conduct (2) which was directed at persons other than plaintiffs (3) which intentionally or

recklessly caused severe emotional distress, but not necessarily bodily harm, (4) to such persons' immediate family members — the immediate-family requirement — who were present at the time such conduct occurred-the presence requirement. *Valore*, 700 F. Supp. 2d at 78 (citing RESTATEMENT (SECOND) OF TORTS § 46(1)-(2)(a)). As the record shows, plaintiff-spouses have proven the first three elements. Although the fourth element appears to prohibit recovery for emotional injury by those not present at the time such conduct occurs, the drafters of the Restatement include a caveat that this Court has interpreted liberally: "'[i]f the defendants' conduct is sufficiently outrageous and intended to inflict severe emotional harm upon a person which is not present, no essential reason of logic or policy prevents liability.'" *Heiser II*, 659 F. Supp. 2d at 27 (quoting DAN B. DOBBS, THE LAW OF TORTS § 307, at 834 (2000)). As the Court noted in *Heisler II*, "[t]errorism, unique among the types of tortious activities in both its extreme methods and aims, passes this test easily." *Id.*; *accord Brewer*, 664 F. Supp. 2d at 47. Therefore, plaintiff-spouses need not have been present at the time of a terrorist attack to recover for severe emotional injuries suffered as a result. Here, accepting the uncontroverted evidence that the plaintiffs named above suffered severe emotional and physical injury as a result of the injuries suffered by their spouses, the Court concludes that Sudan is liable to them for IIED.[12]

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[12] Plaintiffs' also alleged "loss of solatium." Such a claim under the FSIA-terrorism exception is indistinguishable from an IIED claim. *Valore*, 700 F. Supp. 2d at 85 (citing *Heiser II*, 659 F. Supp. 2d at 27 n. 4); *Beer v. Islamic Republic of Iran*, 574 F.

D. Damages

Plaintiffs have stated claims and seek recovery for assault, battery, IIED, and loss of solatium. Section 1605A(c)(4) of the FSIA provides that damages available under the FSIA-created cause of action may "include economic damages, solatium, pain and suffering, and punitive damages." Accordingly, those who survived the Cole attack can recover damages for their pain and suffering, as well as any other economic losses caused by their injuries; family members can recover solatium damages for their emotional injury; and all plaintiffs can recover punitive damages.

"To obtain damages against defendants in an FSIA action, the plaintiff must prove that the consequences of the defendants' conduct were 'reasonably certain (i.e., more likely than not) to occur, and must prove the amount of the damages by a reasonable estimate consistent with this [Circuit's] application of the American rule on damages.'" *Valore*, 700 F. Supp. 2d at 84 (citing, *Salazar*, 370 F. Supp. 2d at 115-16); *accord Hill v. Republic of Iraq*, 328 F.3d 680, 681 (D.C. Cir 2003). As discussed above, plaintiffs have demonstrated that Sudan's provision of material support to Al Qaeda was reasonably certain to — and indeed intended to — cause injury to plaintiffs. The Court now estimates the differing amounts of damages sought under the FSIA-created cause of action, based in part on the expert report that

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Supp. 2d. 1, 13 (D.D.C. 2008). Therefore the Court only considers the IIED claim and awards appropriate damages (also known at "solatium damages") below.

plaintiffs submitted as well the framework established by this Court in similar FSIA terrorism cases.

1. Economic Damages

The plaintiffs presented evidence of their lost earning capacity through the testimony and expert reports of Dana Kaufman, JD, CPA, CFE, a forensic accounting expert accepted by the Court. *See* Ex. 107. Mr. Kaufman's reports provide calculations for the lost earnings of each of the plaintiff-sailors injured in the terrorist attack on the Cole. *Id.* Mr. Kaufman's methodology assumed that each sailor would complete a twenty-year career in the Navy and then retire. Ex. 107 at 29:25-30:22. He did not add any additional lost wages that may have occurred after retirement from the Navy. Ex. 107 at 19:11-20:13. After calculating what each sailor would have earned in the Navy, he subtracted their prospective retirement benefits to reach his conclusion. *Id.* The Court finds that this conservative approach is acceptable. Based upon his calculations, two of the sailors injured in the bombing, Keith Lorensen and John Buckley III, did not suffer any lost earning capacity. Ex. 107 at 26:21-27:11, 25:5-16. Having reviewed Dr. Kaufmans' testimony and reports, the Court finds that the plaintiffs are entitled to receive compensatory damages for the total economic damages. The precise amounts are set forth in the judgment accompanying this opinion.

2. Sailor-Plaintiff's Pain and Suffering

In addition to economic damages, plaintiffs may be entitled to compensation for the pain and suffering they experienced as a direct result of the Cole

bombing. "Damages for surviving victims [of a terrorist attack] are determined based upon an assessment of such factors as 'the severity of the pain immediately following the injury, the length of hospitalization, and the extent of the impairment that will remain with the victim for the rest of his or her life.'" *Valore*, 700 F. Supp. 2d at 83-84 (citing *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 51 (D.D.C. 2007)). "'In awarding pain and suffering damages, the Court must take pains to ensure that individuals with similar injuries receive similar awards.'" *Id.* "Thus in *Peterson*, the Court granted a baseline award of $5 million to individuals suffering such physical injuries as compound fractures, severe flesh wounds, and wounds and scars from shrapnel, as well as 'lasting and severe psychological pain.'" *Id.* "The Court was willing to depart upward from this baseline to $7.5-$12 million in more severe instances of physical and psychological pain, such as where victims suffered relatively more numerous and severe injuries, were rendered quadriplegic, partially lost vision and hearing, or were mistaken for dead, as was one soldier who 'was placed in a body bag [and] buried alive in a morgue for four days until someone heard him moaning in pain.'" *Id.*; *see also Estate of Bland v. Islamic Republic of Iran*, 2011 WL 6396527 (D.D.C. Dec. 21, 2011). Conversely, the Court will depart downward from the $5 million baseline, by an amount of $2-3 million, where victims suffered "minor shrapnel injuries or minor injury from small-arms fire," *Valore*, 700 F. Supp. 2d at 84. As well, when a serviceman suffers severe emotional injury without physical injury, this Court has typically

awarded the victim $1.5 million. *See Valore*, 700 F. Supp. 2d at 85; *Bland*, 2011 WL 6396527 at *3. This Court finds that the baseline set forth in *Valore* is appropriate in this case and applies the upward and downward departures below.

Based upon the severity of certain injuries described above, the Court awards the baseline amount of $5 million to the following plaintiffs for their pain and suffering: Rick Harrison, Carl Wingate, Keith Lorenson, Robert McTureous, David Morales, and Rubin Smith. Following the rule on upward departure, the Court awards the following plaintiffs an upward departure to $7.5 million in damages: John Buckley, Margaret Lopez, and Jeremy Stewart. Finally, the Court departs downward for plaintiffs whose physical injuries were not as severe. Accordingly, Eric Williams is awarded $3 million, and Edward Love and Martin Songer, whose physical injuries were relatively minor, are each awarded $2 million. *See Peterson*, 515 F. Supp. 2d at 54 (departing downward to $2 million where victim "was minimally injured" but "suffered lasting and severe psychological problems.").

Although the remaining plaintiffs, Martin Songer and Gina Morris, did not suffer direct physical injuries as a result of the bombing, they have suffered psychological harm. A downward departure from the baseline of $5 million is also appropriate for these plaintiffs. In accordance with this Court's awards in other cases where plaintiffs on the scene of the attack did not suffer physical harm, Ms. Morris and Mr. Toney are awarded $1.5 million each.

3. Intentional Infliction of Emotional Distress/ Solatium to Spouses

In similar actions, this Court held that spouses of surviving service members may be entitled to $4 million in solatium damages (or harm from IIED). *Valore*, 700 F. Supp. 2d at 85 (citing *Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229, 269 (D.D.C. 2006) and referring to the amounts it establishes for solatium damages as a "framework"); *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 52; *cf. Acosta v. Islamic Republic of Iran*, 574 F. Supp. 2d 15, 29 (D.D.C. 2008) ("In determining the appropriate award of damages for solatium, the Court may look to prior decisions awarding damages for intentional infliction of emotional distress as well as to decisions regarding solatium."). This amount is "not set in stone," however, *see Valore*, 700 F. Supp. 2d at 86, and the Court may adjust it as it sees fit. In *Bland*, for example, this Court held that it is inappropriate for the solatium awards of family members to exceed the pain and suffering awards of the surviving servicemen. *Bland*, 2011 WL 6396527 at *5 ("[T]he Court does not think it appropriate for the . . . spouse to recover more than the victim"). In light of these holdings, the Court applies the baseline amount to the claims of Lisa Lorenson and Andy Lopez (whose spouses are awarded $5 and 7.5 million, respecitvely, for their pain and suffering) and awards them $4 million for the harm they suffered upon learning of the Cole attack and the injuries of their spouses and for the psychological harm they continue to experience as a result of the incident. The Court further finds that downward adjustment is warranted for the solatium damages of Shelly Songer

because her spouse, Martin Songer, was awarded $2 million for his pain and suffering. Following *Bland*, the Court awards Mrs. Songer $1 million.

4. Punitive Damages

Having established the compensatory damage awards, the Court now determines whether, and to what extent, it should levy punitive damages against Sudan. Under 28 U.S.C. § 1605A, foreign state sponsors of terrorism may be liable for such damages. *See* 28 U.S.C. § 1605A(c). According to the Second Restatement of Torts, punitive damages are designed to both "punish [a defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future." RESTATEMENT (SECOND) OF TORTS § 908(1) (1977). Further, they "may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." *Id.* Here, the Court finds Sudan's acts sufficiently outrageous to justify punitive damages. While Sudan's support of Al Qaeda does not rise to level of direct involvement in the attacks, it was nonetheless intentional, material and, as a result, reprehensible. *See Baker*, 775 F. Supp. 2d at 85 (finding that the character of defendant's actions in providing material support and sponsorship to terrorist organization merited award of punitive damages).

In determining the proper punitive award, courts typically consider four factors: "(1) the character of the defendants' act, (2) the nature and extent of harm to the plaintiffs that the defendants caused or intended to cause, (3) the need for deterrence, and (4) the wealth of the defendants." *Flatow*, 999 F. Supp.

at 32 (citing RESTATEMENT (SECOND) OF TORTS § 908(1)-(2) (1965)). Synthesizing these factors, courts in similar cases have generated two numbers that, together, determine the punitive damages award: (1) the multiplicand and (2) the multiplier (the factor by which the multiplicand should be multiplied to yield the desired deterrent effect). Depending on the evidence available, the multiplicand is either the magnitude of defendant's annual expenditures on terrorist activities, *see Valore*, 700 F. Supp. 2d at 87-88, or the amount of compensatory damages already awarded, *see Bland*, 2011 WL 6396527, at *6 (using compensatory damages as the multiplicand and 3.44 as the multiplier, based on a ratio set forth in earlier cases). Here, plaintiffs have not presented evidence relating to Sudan's actual expenditures on terrorist activities.[13] The Court will thus use the compensatory damages value as the multiplicand.

The multiplier has ranged between three and, in exceptional cases, five. *See Haim v. Islamic Republic of Iran*, 784 F. Supp. 2d 1, 13 (D.D.C. 2011); *Valore*, 700 F. Supp. 2d at 88-89. The Court finds no exceptional circumstances here. Contrary to plaintiffs' assertion, Sudan's brief and cursory participation in the *Rux* litigation does not suggest

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[13] Citing various publicly availably courses, plaintiffs argue that Sudan benefitted from Bin Laden and Al Qaeda's capital and infrastructure investments, submitting figures on Sudan's gross domestic product, the growth thereof, and annual revenue from oil. After reviewing these figures, the Court concludes that these figures do not indicate what level of punitive damages that would that would punish or deter Sudan from providing future support to terrorist entities. The Court therefore does not consider them in its damages calculation.

that, at this point in time, its government is more amenable to a deterrent signal from this Court. Therefore, the Court awards plaintiffs three times the compensatory damages in punitive damages, to be distributed in proportion to each plaintiff's share of the compensatory award.

5. Prejudgment Interest

Plaintiffs also request pre-judgment interest. Whether to award such interest is a question that rests within this Court's discretion, subject to equitable considerations. *See Pugh v. Socialist People's Libyan Arab Jamahiriya*, 530 F. Supp. 2d 216, 263 (D.D.C. 2008). "Courts in this Circuit have awarded prejudgment interest in cases where plaintiffs were delayed in recovering compensation for their injuries — including, specifically, where such injuries were the result of targeted attacks perpetrated by foreign defendants." *Baker v. Socialist People's Libyan Arab Jamahirya*, 775 F. Supp. 2d 48, 86 (D.D.C. 2011). The Court finds no delay here. Plaintiffs filed their claim in October 2010. As well, Sudan, having never even appeared in this case, has not prolonged the litigation. Thus, the Court does not find any equitable grounds for awarding pre-judgment interest. Moreover, because the Court has applied the framework in *Heiser*, to its calculation of solatium damages (as explicitly proposed by plaintiffs), prejudgment interest is not appropriate for these awards. *See Oveissi v. Islamic Republic of Iran*, 768 F. Supp. 2d 16, 30 n.12 (D.D.C. 2011) (concluding that pre-judgment interest was not warranted for solatium damages because the values set by the *Heiser* scale "represent the appropriate

level of compensation, regardless of the timing of the attack.").

V. CONCLUSION

For the foregoing reasons, this Court finds Sudan liable for the injuries that plaintiffs suffered and awards damages accordingly. A separate Order and Judgment consistent with these findings shall issue this date.

/s/ ROYCE C. LAMBERTH
United States District Chief Judge

Dated: March 30, 2012

UNITED STATES DISTRICT
AND BANKRUPTCY COURTS
FOR THE DISTRICT OF COLUMBIA

[Filed: 04/19/12]

Civil Action No.: 10-01689-RCL

RICK HARRISON, et al.,

Plaintiff(s)

vs.

REPUBLIC OF SUDAN,

Defendant(s)

AFFIDAVIT REQUESTING FOREIGN MAILING

I, the undersigned, counsel of record for plaintiff(s), hereby request that the Clerk mail a copy of the ~~summons and complaint~~ Notice of Default Judgment (and notice of suit, where applicable) to (list name(s) and address(es) of defendants):

Republic of Sudan
Deng Alor Koul
Minister of Foreign Affairs
Embassy of the Republic of Sudan
2210 Massachusetts Avenue NW
Washington, DC 20008

by: (check one)

☒ registered mail, return receipt requested
☐ DHL

pursuant to the provisions of: (check one)

☐ FRCP 4(f)(2)(C)(ii)
☒ 28 U.S.C. § 1608(a)(3)
☐ 28 U.S.C. § 1608(b)(3)(B)

I certify that this method of service is authorized by the domestic law of (name of country): United States of America, and that I obtained this information by contacting the Overseas Citizens Services, U.S. Department of State.

/s/ Nelson M. Jones III
(Signature)

Nelson M. Jones, III
D.C. BAR # 320266
440 Louisiana St., Suite 1575
Houston, Texas 77002
(Name and Address)

UNITED STATES DISTRICT
AND BANKRUPTCY COURTS
FOR THE DISTRICT OF COLUMBIA

[Filed: 04/20/12]

Civil Action No.: 10cv1689-RCL

RICK HARRISON et al

Plaintiff(s)

vs.

REPUBLIC OF SUDAN

Defendant(s)

CERTIFICATE OF MAILING

I hereby certify under penalty of perjury, that on the 20th day of April, 2012, I mailed:

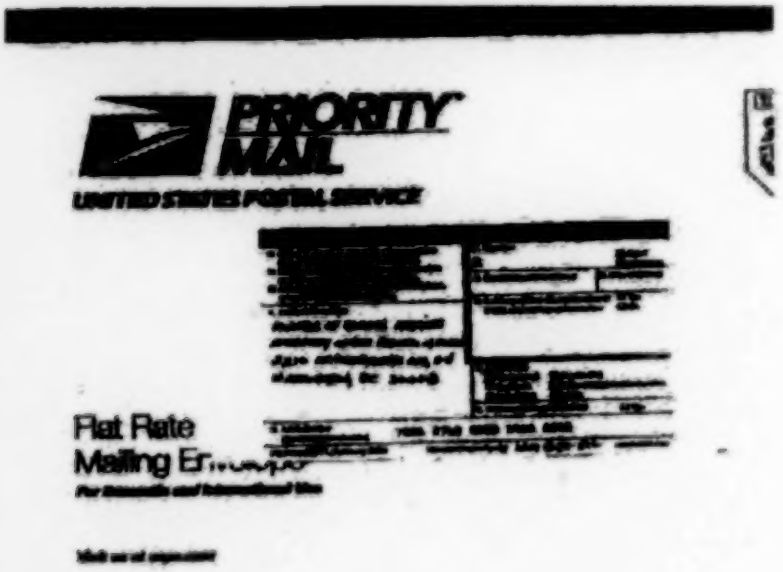
1. ☐ One copy of the default by registered mail, return receipt requested, to the individual of the foreign state, pursuant to the provisions of FRCP 4(f)(2)(C)(ii).

2. ☒ One copy of the default, together with a translation of each into the official language of the foreign state, by registered mail, return receipt requested, to the head of the ministry of foreign affairs, pursuant to the provisions of 28 U.S.C. § 1608(a)(3).

3. ☐ Two copies of the summons, complaint and notice of suit, together with a translation of each into the official language of the foreign state, by certified mail, return receipt requested, to the U.S. Department of State, Office of Policy Review and Interagency Liaison, Overseas Citizens Services, 2100 Pennsylvania Avenue, NW, Fourth Floor, Washington, DC 20520, ATTN: Director of Overseas Citizens Services, pursuant to the provisions of 28 U.S.C. § 1608(a)(4).

4. ☐ One copy of the summons and complaint, together with a translation of each into the official language of the foreign state, by registered mail, return receipt requested, to the agency or instrumentality of the foreign state, pursuant to 28 U.S.C. § 1608(b)(3)(B).

ANGELA D. CAESAR, CLERK
By: /s/ Reginald D. Johnson
Deputy Clerk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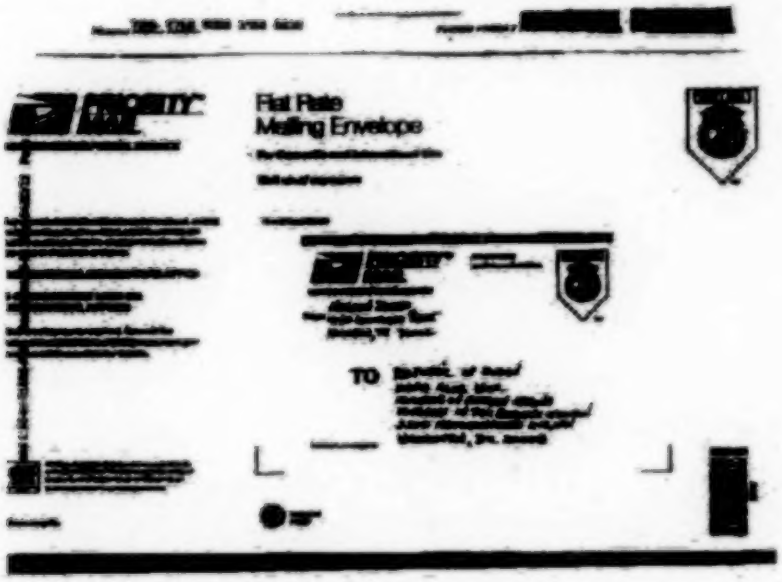
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[Filed: 09/20/2013]

Case No. 13 Civ. 3127 (AT)

RICK HARRISON, JOHN BUCKLEY III, MARGARET LOPEZ, ANDY LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARD LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, MARTIN SONGER, JR., SHELLY SONGER, JEREMY STEWART, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE, AND TRACEY SMITH, as Personal Representative of the Estate of Rubin Smith,

Plaintiffs/Judgment Creditors,

v.

THE REPUBLIC OF SUDAN,

Defendant/Judgment Debtor.

ORDER GRANTING MOTION FOR ENTRY OF ORDER FINDING SUFFICIENT TIME HAS PASSED TO SEEK ATTACHMENT AND EXECUTION AND AUTHORIZING ATTACHMENT OF DEFENDANTS/JUDGMENT-DEBTORS' ASSETS WITHIN THIS JURISDICTION PURSUANT TO 28 U.S.C. § 1610(c)

AND NOW, this 20th day of September 2013, upon Plaintiffs' Motion for Entry of Order Finding Sufficient Time has Passed to Seek Attachment and Execution and Authorizing Attachment of Defendants/Judgment-Debtors' Assets Within This Jurisdiction Pursuant to 28 U.S.C. § 1610(c) (the "Motion"), the Motion is GRANTED. The Court hereby concludes that, under 28 U.S.C. § 1610(c), all conditions precedent to the Plaintiffs' request to attach and execute against blocked assets of the Defendant/Judgment Debtor, Republic of Sudan, have been met, including providing proper notification of the default judgment to the Defendant/Judgment Debtor, pursuant to 28 U.S.C. § 1608(e), and that, for the purposes of attachment and execution, a reasonable period of time has elapsed following the entry of judgment and the giving of notice to the Defendant/Judgment Debtor. The Plaintiffs are hereby authorized to seek attachment of frozen assets located within this jurisdiction using post-judgment enforcement procedures.

BY THE COURT:

/s/ Analisa Torres
ANALISA TORRES
United States District Judge

Dated: September 20, 2013
New York, New York

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[Filed: 12/12/2013]

Case No. 1:13-cv-03127 (AT)

RICK HARRISON, JOHN BUCKLEY III, MARGARET LOPEZ, ANDY LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARDS LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, MARTIN SONGER, JR., SHELLY SONGER, JEREMY STEWART, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE, TRACEY SMITH, as Personal Representative of the Estate of Rubin Smith,

Plaintiffs,

vs.

THE REPUBLIC OF SUDAN,

Defendant,

vs.

MASHREQBANK PSC,

Respondent.

TURNOVER ORDER AGAINST MASHREQBANK

AND NOW, this 12th day of December, 2013, upon Plaintiffs' Petition for Turnover Order Against

Mashreqbank pursuant to 28 U.S.C. § 1610(g), CPLR § 5225(b) and Federal Rule of Civil Procedure 69(a), the Motion is GRANTED. The Court hereby finds and orders as follows:

1. Plaintiffs obtained a judgment in the District Court for the District of Columbia in the amount of $314,705,896, plus interest (the "Judgment"), and the entire principal amount of the Judgment remains unsatisfied.

2. Funds held at Mashreqbank are subject to execution and attachment under the Foreign Sovereign Immunities Act because the owners of the funds are agencies and instrumentalities of the Republic of Sudan.

3. [redacted], also known as [redacted], is an agency and instrumentality of the Sudanese government. The following account, totaling [redacted], plus accrued interest, is subject to execution to satisfy the Plaintiffs' outstanding judgment.

Respondent Bank	Account Owner	Description	Value
[redacted]	[redacted]	[redacted]	[redacted]

4. [redacted] is an agency and instrumentality of the Sudanese government. The following account, totaling [redacted] plus accrued interest, are subject to execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	Account Owner	Description	Value
[redacted]	[redacted]	[redacted]	[redacted]

5. [redacted] is an agency and instrumentality of the Sudanese government. The following account, totaling [redacted] plus accrued interest, are subject to execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	Account Owner	Description	Value
[redacted]	[redacted]	[redacted]	[redacted]

6. [redacted], also known as [redacted], is an agency and instrumentality of Sudan. The following account, totaling [redacted], plus accrued interest, is subject to execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	Account Owner	Description	Value
[redacted]	[redacted]	[redacted]	[redacted]

7. The Court hereby directs Mashreqbank to turn over the proceeds of the foregoing accounts, totaling [redacted] (the "Turnover Assets"), together with any accrued interest, to the Plaintiffs within ten (10) days from the date of this Order.

8. An OFAC license is not necessary to disburse these funds and no notice is necessary to the Sudanese agencies and instrumentalities. *See Heiser v. Bank of Tokyo Mitsubishi UFJ, New York Branch*, 919 F. Supp. 2d 411, 422 (S.D.N.Y. 2013); *Heiser v. Islamic Republic of Iran*, 807 F. Supp. 2d 9, 23 (D.D.C. 2011); *Weininger v. Castro*, 432 F. Supp. 2d 457 (S.D.N.Y. 2006).

9. Upon turnover by Mashreqbank of the Turnover Assets to the Plaintiffs, plus all accrued interest thereon to date, Mashreqbank shall be fully

discharged pursuant to CPLR §§ 5209 or 6204 and Rule 22 of the Federal Rules of Civil Procedure, as applicable, and released from any and all liability and obligations or other liabilities, including all writs of execution, notices of pending action, restraining notices and other judgment creditor process of any kind, whether served on, or delivered to Mashreqbank, to the extent that they apply, purport to apply or attach to the Turnover Assets, to defendant Sudan, and to any agency and instrumentality of Sudan, or to any other party otherwise entitled to claim the Turnover Assets (in whole or in part), including without limitation, the plaintiffs in *Owens, et al. v. Republic of Sudan, et al.*, 1:01-cv-02244-JDB (D.D.C.), and any other persons or entities, to the full extent of such amounts so held and deposited in compliance with this partial judgment. Mashreqbank shall provide a copy of this order to counsel for Owens within 5 days of the date of this order.

10. Upon payment and turnover by Mashreqbank of the Turnover Assets to the Plaintiffs, plus all accrued interest thereon to date, all other persons and entities shall be permanently restrained and enjoined from instituting or prosecuting any claim, or pursuing any action against Mashreqbank in any jurisdiction or tribunal arising from or relating to any claim (whether legal or equitable) to the funds turned over in compliance with paragraph 7 of this Order.

11. This Order enforces a duly registered District Court judgment from the District of Columbia, recognized by a New York Federal Court and given full faith and credit by this Court.

So ordered,

/s/ Analisa Torres
ANALISA TORRES
United States District Judge

Dated: December 12, 2013

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[Filed: 12/13/2013]

Case No. 1:13-cv-03127 (AT)

RICK HARRISON, JOHN BUCKLEY III, MARGARET LOPEZ, ANDY LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARDS LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, MARTIN SONGER, JR., SHELLY SONGER, JEREMY STEWART, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE, AND TRACY SMITH, as Personal Representative of the Estate of Rubin Smith,

Plaintiffs,

vs.

THE REPUBLIC OF SUDAN,

Defendant,

vs.

BNP PARIBAS,

Respondent.

AMENDED TURNOVER ORDER AGAINST BNP PARIBAS

REDACTED PURSUANT TO PROTECTIVE ORDER

AND NOW, this 13th day of December, 2013, upon Plaintiffs' Petition for Turnover Order Against BNP Paribas pursuant to 28 U.S.C. § 1610(g), CPLR § 5225(b) and Federal Rule of Civil Procedure 69(a), and Plaintiffs' Unopposed Motion for Order Amending Turnover Order Against BNP Paribas, the Motion is GRANTED. The Court hereby finds and orders as follows:

1. Plaintiffs obtained a judgment in the District Court for the District of Columbia in the amount of $314,705,896, plus interest (the "Judgment"), and the entire principal amount of the Judgment remains unsatisfied.

2. Funds held at BNP Paribas New York Branch are subject to execution and attachment under the Foreign Sovereign Immunities Act because the owners of the funds are agencies and instrumentalities of the Republic of Sudan.

3. [redacted], also known as [redacted], is an agency and instrumentality of the Sudanese government. The following accounts, totaling [redacted], plus accrued interest, are subject to execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	Account Beneficiary	Blocking Date	Value (as of June 30, 2012)
BNP Paribas	[redacted]	[redacted]	[redacted]
BNP Paribas	[redacted]	[redacted]	[redacted]
BNP Paribas	[redacted]	[redacted]	[redacted]
BNP Paribas	[redacted]	[redacted]	[redacted]
BNP Paribas	[redacted]	[redacted]	[redacted]

4. [redacted], Sudan is an agency and instrumentality of the Sudanese government. The following accounts, totaling [redacted] plus accrued interest, are subject to execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	Account Beneficiary	Blocking Date	Value (as of June 30, 2012)
BNP Paribas	[redacted]	[redacted]	[redacted]
BNP Paribas	[redacted]	[redacted]	[redacted]
BNP Paribas	[redacted]	[redacted]	[redacted]
BNP Paribas	[redacted]	[redacted]	[redacted]

5. [redacted] is an agency and instrumentality of the Sudanese government. The following accounts, totaling [redacted], plus accrued interest, are subject to execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	Account Beneficiary	Blocking Date	Value (as of June 30, 2012)
BNP Paribas	[redacted]	[redacted]	[redacted]
BNP Paribas	[redacted]	[redacted]	[redacted]

6. [redacted], formerly known as [redacted], is an agency and instrumentality of Sudan. The following account, totaling [redacted], plus accrued interest, is subject to execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	Account Beneficiary	Blocking Date	Value (as of June 30, 2012)
BNP Paribas	[redacted]	[redacted]	[redacted]

7. [redacted] is an agency and instrumentality of **Sudan.** The following account, totaling [redacted], plus accrued interest, is subject to execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	Account Beneficiary	Blocking Date	Value (as of June 30, 2012)
BNP Paribas	[redacted]	[redacted]	[redacted]

8. [redacted] is an agency and instrumentality of **Sudan.** The following accounts, totaling [redacted], plus accrued interest, are subject to execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	Account Beneficiary	Blocking Date	Value (as of June 30, 2012)
BNP Paribas	[redacted]	[redacted]	[redacted]
BNP Paribas	[redacted]	[redacted]	[redacted]
BNP Paribas	[redacted]	[redacted]	[redacted]

9. The Court hereby directs BNP Paribas to turn over the proceeds of the foregoing accounts, totaling [redacted] (the "Turnover Assets"), together with any accrued interest, to the Plaintiffs within ten (10) days from the date of this Order.

10. An OFAC license is not necessary to disburse these funds and no notice is necessary to the Sudanese agencies and instrumentalities. *See Heiser v. Bank of Tokyo Mitsubishi UFJ, New York Branch*, 919 F. Supp. 2d 411, 422 (S.D.N.Y. 2013); *Heiser v. Islamic Republic of Iran*, 807 F. Supp. 2d 9, 23

(D.D.C. 2011); *Weininger v. Castro*, 432 F. Supp. 2d 457 (S.D.N.Y. 2006).

11. Upon turnover by BNP Paribas of the Turnover Assets to the Plaintiffs, plus all accrued interest thereon to date, BNP Paribas shall be fully discharged pursuant to CPLR §§ 5209 or 6204 and Rule 22 of the Federal Rules of Civil Procedure, as applicable, and released from any and all liability and obligations or other liabilities, including all writs of execution, notices of pending action, restraining notices and other judgment creditor process of any kind, whether served on, or delivered to BNP Paribas, to the extent that they apply, purport to apply or attach to the Turnover Assets, to defendant Sudan, and to any agency and instrumentality of Sudan, or to any other party otherwise entitled to claim the Turnover Assets (in whole or in part), including without limitation, the plaintiffs in *Owens, et al. v. Republic of Sudan, et al.*, 1:01-cv-02244-JDB (D.D.C.), and any other persons or entities, to the full extent of such amounts so held and deposited in compliance with this partial judgment. BNP Paribas shall provide a copy of this order to counsel for Owens within 5 days of the date of this order.

12. Upon payment and turnover by BNP Paribas of the Turnover Assets to the Plaintiffs, plus all accrued interest thereon to date, all other persons and entities shall be permanently restrained and enjoined from instituting or prosecuting any claim, or pursuing any action against BNP Paribas in any jurisdiction or tribunal arising from or relating to any claim (whether legal or equitable) to the funds turned over in compliance with paragraph 9 of this Order.

13. This Order enforces a duly registered District Court judgment from the District of Columbia, recognized by a New York Federal Court and given full faith and credit by this Court.

14. This Order supersedes any prior order relating to the Turnover Assets described in this Order.

So ordered,

/s/ Analisa Torres
ANALISA TORRES
United States District Judge

Dated: December 13, 2013

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[Filed: 01/06/2014]

Case No. 1:13-cv-03127 (AT)

RICK HARRISON, JOHN BUCKLEY III, MARGARET LOPEZ, ANDY LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARDS LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, MARTIN SONGER, JR., SHELLY SONGER, JEREMY STEWART, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE, AND TRACEY SMITH, as Personal Representative of the Estate of Rubin Smith,

Plaintiffs,

vs.

THE REPUBLIC OF SUDAN,

Defendant,

vs.

CREDIT AGRICOLE CORPORATE & INVESTMENT BANK,

Respondent.

TURNOVER ORDER

WHEREAS on December 18, 2013, Plaintiffs, Rick Harrison, John Buckley III, Margaret Lopez, Andy

Lopez, Keith Lorensen, Lisa Lorensen, Edwards Love, Robert McTureous, David Morales, Gina Morris, Martin Songer, Jr., Shelly Songer, Jeremy Steward, Kesha Stidham, Aaron Toney, Eric Williams, Carl Wingate, and Tracy Smith, as Personal Representative of the Estate of Rubin Smith ("Plaintiffs"), filed their Petition for Turnover Order Against Credit Agricole Corporate and Investment Bank ("CA-CIB") pursuant to 28 U.S.C. § 1610(g), CPLR § 5225(b) and Federal Rule of Civil Procedure 69(a) ("Petition"), which is currently before the Court;

WHEREAS, Plaintiffs have provided notice to the United States Department of the Treasury's Office of Foreign Assets Control ("OFAC") of this Petition and OFAC having not appeared or otherwise objected to the relief sought in the Petition;

WHEREAS, Plaintiffs obtained a judgment in the District Court for the District of Columbia in the amount of $314,705,896, plus interest (the "Judgment"), and the entire principal amount of the Judgment remains unsatisfied; and

WHEREAS, Plaintiffs' Petition established that the funds described in the Petition, totaling REDACTED (as of June 29, 2012), plus accrued interest (the "Turnover Assets"), are subject to turnover pursuant to C.P.L.R. § 5225, 28 U.S.C. § 1610(g) and the Terrorism Risk Insurance Act of 2002, Pub. No. 107-297, 116 Stat 2322 (2002), codified at 28 U.S.C. § 1610, in partial satisfaction of Plaintiffs' Judgment.

AND NOW, this 6th day of January, 2014 upon Plaintiffs' Petition, it is **ORDERED, ADJUDGED AND DECREED THAT**:

1. The Petition is GRANTED.

2. The Court finds that the Turnover Assets are subject to turnover pursuant to § 201 of the Terrorism Risk Insurance Act of 2002 and are subject to execution and attachment under the Foreign Sovereign Immunities Act because the owners of the funds are agencies and instrumentalities of the Republic of Sudan.

3. [redacted] is an agency and instrumentality of the Sudanese government. The following accounts, totaling [redacted], and [redacted] (as of June 29, 2012), plus accrued interest, are subject to execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	Originating Entity / Originating Bank	Blocking Date	Value ($) (as of June 29, 2012)
CA-CIB	[redacted]	[redacted]	[redacted]
CA-CIB	[redacted]	[redacted]	[redacted]

4. [redacted] is an agency and instrumentality of the Sudanese government. The following account, totaling [redacted] (as of June 29, 2012), plus accrued interest, is subject to execution to satisfy the Plaintiffs' outstanding judgment:

Respondent Bank	Originating Entity / Originating Bank	Blocking Date	Value ($) (as of June 29, 2012)
CA-CIB	[redacted]	[redacted]	[redacted]

5. The Court hereby directs CA-CIB to turn over the Turnover Assets totaling [redacted] (as of June 29, 2012), together with accrued interest, by wire transfer to Plaintiffs' counsel, Hall, Lamb and Hall, P.A., pursuant to wire instructions to be furnished to CA-CIB by Plaintiffs, in partial satisfaction of

Plaintiffs' Judgment, within fifteen (15) days from the date of this Order.

6. Upon turnover by CA-CIB of the funds identified herein to the Plaintiffs, plus all accrued interest thereon to date, Credit Agricole shall be fully discharged pursuant to CPLR §§ 5209 or 6204 and Rule 22 of the Federal Rules of Civil Procedure, as applicable, and released from any and all liability and obligations or other liabilities in connection with the turnover of those funds, including all writs of execution, notices of pending action, restraining notices and other judgment creditor process of any kind, whether served on, or delivered to CA-CIB, to the extent that they apply, purport to apply or attach to the Turnover Assets, to defendant The Republic of Sudan, and to any agency and instrumentality of The Republic of Sudan, or to any other party otherwise entitled to claim the Turnover Assets (in whole or in part), and any other persons or entities, to the full extent of such amounts so held and deposited in compliance with this Judgment.

7. Upon payment and turnover by CA-CIB of the Turnover Assets to Plaintiffs, plus all accrued interest thereon to date, all other persons and entities shall be permanently restrained and enjoined from instituting or prosecuting any claim, or pursuing any actions against CA-CIB in any jurisdiction or tribunal arising from or relating to any claim (whether legal or equitable) to the funds turned over in compliance with paragraph 3 of this Order.

8. Plaintiffs' Information Subpoena, Interrogatories, and Restraining Notice to CA-CIB shall be vacated except with respect to the three accounts identified in paragraph 10, below.

9. An OFAC license is not necessary to disburse these funds and no notice is necessary to the Sudanese agencies and instrumentalities. *See Heiser v. Bank of Tokyo Mitsubishi UFJ, New York Branch*, 919 F. Supp. 2d 411, 422 (S.D.N.Y. 2013); *Heiser v. Islamic Republic of Iran*, 807 F. Supp. 2d 9, 23 (D.D.C. 2011); *Weininger v. Castro*, 432 F. Supp. 2d 457 (S.D.N.Y. 2006).

10. Notwithstanding anything in this Order to the contrary, Plaintiffs reserve all rights to seek turnover of the following other amounts blocked by CA-CIB pursuant to regulations promulgated by OFAC, which CA-CIB will continue to restrain:

Respondent Bank	Account Beneficiary /Beneficiary Bank	Blocking Date	Value ($) (as of June 30,2013)
CA-CIB	[redacted]	[redacted]	[redacted]
CA-CIB	[redacted]	[redacted]	[redacted]
CA-CIB	[redacted]	[redacted]	[redacted]

Plaintiffs and CA-CIB shall meet and confer as to these amounts following the issuance by the Second Circuit of its rulings in *Calderon-Cardona v. JPMorgan Chase Bank, N.A.*, No. 12-75 (2d Cir), and *Hausler v. JPMorgan Chase, N.A.*, Nos. 12-1264 & 12-1272 (2d Cir.)

11. This Order enforces a duly registered District Court judgment from the District of Columbia, recognized by a New York Federal Court and given full faith and credit by this Court.

So ordered,

/s/ Analisa Torres
ANALISA TORRES
United States District Judge

Dated: January 6, 2014

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed: 01/14/2014]

Case No. 1:13-cv-03127-AT

RICK HARRISON, et al.

Plaintiff,

v.

REPUBLIC OF SUDAN

Defendant.

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Defendant Republic of Sudan appeals to the United States Court of Appeals for the Second Circuit from the Turnover Orders [ECF Documents 20, 21 and 31] in this case of this Court (the Honorable Annalisa Torres) dated December 12, 2013, December 13, 2013 and January 6, 2014, ordering financial institutions MashreqBank, BNP Paribas and Credit Agricole Corporate & Investment Bank, respectively, to turn over funds in specified accounts to Plaintiffs in the above-styled case.

Dated: January 13, 2014

By: /s/
Asim AR Ghafoor

Law Office of Asim
Ghafoor
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Washington, DC 20007
Telephone: 202-330-1479
Fax: 202-318-4331
asim@glawoffice.com
*Attorney awaiting Pro
Hac Vice admission
Defendant Republic of
Sudan*

TO: Clerk of the Court

and By: _____/s/_____.
Lamis Deek
Law Offices of Lamis
Deek
351 Broadway, 3rd Floor
New York, NY 10013
212-226-3999

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Attorneys for
Respondents

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Argued: 01/05/2015

Decided: 09/23/2015]

August Term 2014

Docket No: 14-121-cv

RICK HARRISON, JOHN BUCKLEY, III, MARGARET LOPEZ, ANDY LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARD LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, MARTIN SONGER, JR., SHELLY SONGER, JEREMY STEWART, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE, TRACEY SMITH, as personal representative of the Estate of Rubin Smith,

Plaintiffs-Appellees,

v.

REPUBLIC OF SUDAN,

Defendant-Appellant,

ADVANCED CHEMICAL WORKS, AKA Advanced Commercial and Chemical Works Company Limited, AKA Advanced Training and Chemical Works Company Limited, Accounts & Electronics Equipments, AKA Accounts and Electronics Equipments, et al.,

Defendants,

NATIONAL BANK OF EGYPT, CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK,

*Respondents.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Before:

LYNCH and CHIN, *Circuit Judges,*
and KORMAN, *District Judge.***

Appeal from three orders of the United States District Court for the Southern District of New York (Torres, *J.*), requiring respondent banks holding assets of defendant-appellant Republic of Sudan to turn over funds to satisfy an underlying default judgment obtained by plaintiffs-appellees against the Republic of Sudan in the United States District Court for the District of Columbia. The Republic of Sudan contends that (1) service of process did not comply with the Foreign Sovereign Immunities Act, and (2) the District Court erred by attaching assets of a foreign state to satisfy a judgment under the Terrorism Risk Insurance Act without authorization

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* The Clerk of Court is respectfully requested to amend the caption as set forth above.

** The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

from the Office of Foreign Assets Control or a Statement of Interest from the Department of Justice.

AFFIRMED.

ANDREW C. HALL (Brandon Levitt, *on the brief*), Hall, Lamb and Hall, P.A., Miami, Florida, *for Plaintiffs-Appellees.*
ASIM GHAFOOR, Law Office of Asim Ghafoor, Washington, D.C., *for Defendant-Appellant.*

CHIN, *Circuit Judge*:

On October 12, 2000, an explosive-laden skiff pulled up alongside the U.S.S. Cole, which was docked for refueling at the port of Aden, Yemen, and detonated. Seventeen U.S. Navy sailors were killed in the attack, and forty-two wounded. Fifteen of the injured sailors and three of their spouses brought suit in 2010 in the United States District Court for the District of Columbia (the "D.C. District Court") under the Foreign Sovereign Immunities Act (the "FSIA"), 28 U.S.C. §§ 1330, 1602 *et seq.*, alleging that al Qaeda was responsible for the attack and that the Republic of Sudan ("Sudan") had provided material support to al Qaeda. In 2012, the D.C. District Court entered a default judgment against Sudan in the amount of $314,705,896.

Plaintiffs registered the default judgment in the United States District Court for the Southern District of New York, and then sought to enforce it against funds held by New York banks. The District Court below (Torres, *J.*) issued the three turnover orders before us.

We hold that (1) service of process on the Sudanese Minister of Foreign Affairs via the Sudanese Embassy in Washington, D.C., complied with the FSIA's requirement that service be sent to the head of the ministry of foreign affairs, and (2) the District Court did not err in issuing the turnover orders without first obtaining either a license from the Treasury Department's Office of Foreign Assets Control ("OFAC") or a Statement of Interest from the Department of Justice ("DOJ").

We affirm.

STATEMENT OF THE CASE

Plaintiffs-appellants are sailors and spouses of sailors injured in the bombing of the U.S.S. Cole, who brought suit against Sudan in the D.C. District Court on October 4, 2010, under 28 U.S.C. § 1605A, the terrorism exception to the FSIA, alleging that Sudan provided material support to al Qaeda, whose operatives perpetrated the attack on the vessel.[1]

Pursuant to 28 U.S.C. § 1608(a)(3), plaintiffs filed an Affidavit Requesting Foreign Mailing on November 5, 2010, asking that the Clerk of Court

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[1] One of the sailors died after the suit was brought. His spouse, as representative of his estate, was substituted into the action.

mail the summons and complaint via registered mail, return receipt requested, to:

> Republic of Sudan
> Deng Alor Koul
> Minister of Foreign Affairs
> Embassy of the Republic of Sudan
> 2210 Massachusetts Avenue NW
> Washington, DC 2008

S. App. at 66. As represented by plaintiffs, Deng Alor Koul was the Minister of Foreign Affairs of Sudan at the time.

On November 17, 2010, the Clerk of Court entered a Certificate of Mailing certifying that the summons and complaint were sent via domestic certified mail to the "head of the ministry of foreign affairs," at the Sudanese Embassy in Washington, D.C., *id.* at 67, and that the return receipt was returned to the Clerk of Court and received on November 23, 2010. No attempt was made to serve Sudan at the Ministry of Foreign Affairs in Khartoum, the capital. Sudan failed to serve an answer or other responsive pleading within sixty days after plaintiffs' service, *see* 28 U.S.C. § 1608(d), and the Clerk of Court thus entered a default against Sudan.

On March 30, 2012, after a hearing, the D.C. District Court (Lamberth, *J.*) entered a default judgment against Sudan in the amount of $314,705,896, *Harrison v. Republic of Sudan,* 882 F. Supp. 2d 23, 51 (D.D.C. 2012), and found, *inter alia*, that service on Sudan had been proper, *id.* at 28.[2]

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[2] After oral argument in the instant appeal, Sudan made a Rule 60(b) motion in the D.C. District Court to set aside the

Following entry of the default judgment, plaintiffs filed a second Affidavit Requesting Foreign Mailing, requesting the Clerk to mail notice, this time of the Order and Judgment and the Memorandum Opinion entered by the D.C. District Court, by registered mail, return receipt requested. The Clerk certified in April 2012 that the documents had been mailed to Sudan's Minister of Foreign Affairs via the Sudanese Embassy in Washington, D.C. Sudan again failed to appear or contest the judgment.

On October 2, 2012, plaintiffs registered the judgment in the Southern District of New York, seeking to execute against respondent banks holding Sudanese assets frozen pursuant to the Sudan Sanctions Regulations, *see* 31 C.F.R. Part 538, and on May 9, 2013, plaintiffs filed a Notice of Pending Action.

On June 28, 2013, following a motion by plaintiffs, the D.C. District Court entered an order finding that post-judgment service had been effectuated, and that sufficient time had elapsed following the entry of judgment and the giving of notice of such judgment to seek attachment and execution, pursuant to 28 U.S.C. § 1610(c).[3] On September 20, 2013, the district

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default judgment. *Harrison v. Republic of Sudan*, No. 10-CV-1689 (D.D.C. June 14, 2015) (Docket No. 55). Sudan moved to hold this appeal in abeyance pending resolution of the motion for vacatur. We deny the motion.

[3] Section 1610(c) provides that "[n]o attachment or execution... shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter."

court below entered a similar order, finding both that sufficient time had passed since entry of the default judgment, and that service of the default judgment had been properly effectuated. Sudan failed to challenge these orders.

Plaintiffs then filed a series of petitions in the Southern District seeking turnover of Sudanese assets, including against Mashreqbank, BNP Paribas, and Credit Agricole Corporate and Investment Bank. The District Court granted the petitions, issuing turnover orders on December 12, 2013, December 13, 2013, and January 6, 2014, respectively. Plaintiffs served all three petitions, as well as their § 1610(c) motion, by U.S. mail addressed to Sudan's Minister of Foreign Affairs -- at that point Ali Ahmed Karti, who had replaced Deng Alor Koul as represented by plaintiffs -- via the Embassy of Sudan in Washington.

Sudan filed its notice of appearance on January 13, 2014, only after all three turnover orders were entered by the District Court below. The same day, Sudan timely appealed.[4]

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[4] As a threshold matter, plaintiffs contend that this Court lacks jurisdiction over the December 12, 2013 and December 13, 2013 orders, and that the appeal is timely only with respect to the January 6, 2014 order, because the notice of appeal was not filed until January 14, 2014. Sudan was required to file a notice of appeal "with the district court clerk within 30 days after entry of the judgment or order appealed from," Fed. R. App. P. 4(a)(1)(A), and "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement," *Bowles v. Russell*, 551 U.S. 205, 214 (2007). Sudan did in fact file a notice of appeal on January 13, 2014, the last day for timely filing of an appeal from the earliest order. Though Sudan neglected to manually select

DISCUSSION

Two issues are presented: (a) whether service of process on the Sudanese Minister of Foreign Affairs via the Sudanese Embassy in Washington complied with the requirement of 28 U.S.C. § 1608(a)(3) that service be sent to the head of the ministry of foreign affairs, and (b) whether the District Court erred in issuing turnover orders without first obtaining either an OFAC license or a DOJ Statement of Interest explaining why no OFAC license was required.

A. Service of Process on the Minister of Foreign Affairs

The FSIA provides the sole means for effecting service of process on a foreign state. *See* 28 U.S.C. § 1608(a); H.R. Rep. No. 94-1487, at 23 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6622 ("Section

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the orders it was appealing on ECF, triggering a "filing error" in the docket entry, Docket No. 34, the notice of appeal was accessible on the docket, the notice itself stated in plain language the three orders at issue, and Sudan corrected the electronic error the next day, by filing an otherwise identical order on January 14, 2014. Because there was no ambiguity in Sudan's January 13, 2014 notice of appeal, the appeal is timely as to all three turnover orders. *See Becker v. Montgomery*, 532 U.S. 757, 767 (2001) ("[I]mperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court."); *see also Contino v. United States*, 535 F.3d 124, 127 (2d Cir. 2008) ("[T]he failure to sign [a notice of appeal] may be remedied after the time period for filing the notice has expired."); *New Phone Co. v. City of New York*, 498 F.3d 127, 131 (2d Cir. 2007) ("Our jurisdiction . . . depends on whether the intent to appeal from that decision is clear on the face of, or can be inferred from, the notices of appeal.").

1608 sets forth the exclusive procedures with respect to service on . . . a foreign state . . . ."). Four methods of service are prescribed, in descending order of preference. 28 U.S.C. § 1608(a)(1)-(4). Plaintiffs must attempt service by the first method, or determine that it is unavailable, before attempting subsequent methods in the order in which they are laid out.

The first method is service "in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision." *Id.* § 1608(a)(1). In the absence of such a special arrangement, the statute next permits service "in accordance with an applicable international convention on service of judicial documents." *Id.* § 1608(a)(2). If neither of these first two methods is available, plaintiffs may proceed according to the third method, which permits service "by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court *to the head of the ministry of foreign affairs of the foreign state concerned.*" *Id.* § 1608(a)(3) (emphasis added). Finally, the statute provides that if service cannot be made under the first three paragraphs, service is permitted as a last resort "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services -- and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state." *Id.* § 1608(a)(4).

Here, it is undisputed that service in conformity with the first two methods was unavailable, because plaintiffs have no "special arrangement" for service with Sudan, and because Sudan is not a party to an "international convention on service of judicial documents." *Id.* § 1608(a)(1)-(2). Thus, § 1608(a)(3) was the preferred method of service, and plaintiffs effectuated service in accordance with this paragraph. In the underlying litigation in the D.C. District Court, the Clerk of Court sent process by U.S. mail, return receipt requested, to the Minister of Foreign Affairs, Deng Alor Koul, via the Embassy of Sudan in Washington, D.C.

As an initial matter, plaintiffs complied with the first three clauses of 28 U.S.C. § 1608(a)(3). First, service could not be made under paragraphs (1) or (2) of § 1608(a). Second, plaintiffs directed the Clerk of Court to include in the service package a copy of the summons and complaint, and notice of suit, and the Clerk confirmed that a translation of each was included. And third, plaintiffs directed the clerk of court to serve Sudan by a "form of mail requiring a signed receipt," *id.* § 1608(a)(3), and, after the clerk mailed the service package on November 17, 2010, a return receipt was in fact received on November 23, 2010.[5]

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[5] At oral argument, counsel for Sudan represented that the Minister of Foreign Affairs did not have actual notice of the underlying suit because at the time of the mailing to the Embassy, Sudan was in the final months of a coalition government with the Sudan People's Liberation Movement, before South Sudan became independent. According to counsel, due to the structure of the power-sharing agreement the Minister of Foreign Affairs would not have received notice from

On appeal, Sudan argues that service on Sudan's Minister of Foreign Affairs via the Sudanese Embassy in Washington does not comply with the requirement of the final clause of 28 U.S.C. § 1608(a)(3), that service be sent "to the head of the ministry of foreign affairs." Sudan contends that service should have been sent to Sudan's Minister of Foreign Affairs at the Ministry of Foreign Affairs in Khartoum, and because service was ineffective under § 1608(a), the D.C. District Court lacked personal jurisdiction over Sudan.

In answering this issue, one of first impression in our Circuit, we look to the statutory language, cases that have interpreted this statute, and the legislative history. *See United States v. Allen*, 788 F.3d 61, 66 (2d Cir. 2015).

On its face, the statute requires that process be mailed "to the head of the ministry of foreign affairs of the foreign state." 28 U.S.C. § 1608(a)(3). It is silent as to a specific location where the mailing is to be addressed. If Congress had wanted to require that the mailing be sent to the head of the ministry of foreign affairs in the foreign county, it could have said so. In § 1608(a)(4), for example, Congress specified that the papers be mailed "to the Secretary of State *in Washington, District of Columbia,* to the attention of the Director of Special Consular Services," for transmittal to the foreign state "through diplomatic channels." *Id.* § 1608(a)(4)

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the opposition-controlled Embassy. But on the record before us we can look only at the service as it was mailed and received by the Embassy, and whether that service satisfied the statute.

(emphasis added). Nothing in § 1608(a)(3) requires that the papers be mailed to a location in the foreign state, and the method chosen by plaintiffs -- a mailing addressed to the minister of foreign affairs at the embassy -- was consistent with the language of the statute and could reasonably be expected to result in delivery to the intended person.

What little case law there is on this question accords with our reading of § 1608(a)(3), that service on a minister of foreign affairs via an embassy address constitutes literal compliance with the statute. This is not the first time that Sudan has made the argument for a more restrictive reading of § 1608(a)(3). In *Rux v. Republic of Sudan,* the Eastern District of Virginia rejected Sudan's contention that service had to be mailed directly to the Minister of Foreign Affairs at the Ministry of Foreign Affairs in Khartoum, rather than to the Minister of Foreign Affairs via the Sudanese Embassy. No. 04-CV-428, 2005 WL 2086202, at *16 (E.D. Va. Aug. 26, 2005), *aff'd on other grounds,* 461 F.3d 461 (4th Cir. 2006). The district court found that "[t]he text of § 1608(a)(3) does not prohibit service on the Minister of Foreign Affairs at an embassy address. Indeed, the statute does not prescribe the place of service, only the person to whom process must be served." *Id.*

In another case, *Wye Oak Technology, Inc. v. Republic of Iraq,* the Eastern District of Virginia similarly held that service via an embassy is sufficient to satisfy the FSIA as long as the service is directed to the Minister of Foreign Affairs. No. 09-CV-793, 2010 WL 2613323, at *5-6 (E.D. Va. June 29, 2010), *aff'd on other grounds,* 666 F.3d 2015 (4th Cir.

2011). In *Wye Oak,* a summons was issued by the clerk of the court to the "Head of the Ministry of Foreign Affairs of Iraq, care of the Embassy of the Republic of Iraq in Washington, DC." *Id.* at *4 (internal quotation marks omitted). The district court found that:

> Section (a)(3) does not impose a requirement that an otherwise proper service package must be delivered to a particular destination. No doubt, the address to which the service package is directed must bear some objectively reasonable relationship to the head of the Ministry of Foreign Affairs and the chosen method of delivery must have some reasonable expectation of success. However, there is nothing on the face of Section (a)(3) that prohibits [plaintiff]'s chosen method of delivery to the head of the Ministry of Foreign Affairs . . . .

Id. at *5. We agree.

Cases where § 1608(a)(3) service was held to be ineffective involved suits where service was sent "to a *person* other than the Minister of Foreign Affairs, not to a *place* other than the Ministry of Foreign Affairs." *Rux,* 2005 WL 2086202, at *16 (emphasis in original); *see Magness v. Russian Fed'n,* 247 F.3d 609, 613 (5th Cir. 2001) (finding service improper where complaint sent to Texas Secretary of State for forwarding to Boris Yeltsin, and also sent directly to Russian Deputy Minister of Culture); *Transaero, Inc. v. La Fuerza Aerea Boliviana,* 30 F.3d 148, 153-54 (D.C. Cir. 1994) (finding service improper when made on "the Bolivian Ambassador and Consul General in

Washington, and the Bolivian First Minister and the Bolivian Air Force in La Paz[,] but never [on] the Ministry of Foreign Affairs or the Secretary of State"); *Alberti v. Empresa Nicaraguense De La Carne,* 705 F.2d 250, 253 (7th Cir. 1983) (holding that the Ambassador of Nicaragua cannot be construed as the head of the ministry of foreign affairs).

The legislative record on § 1608(a)(3) is sparse, and sheds little light on the question. The 1976 House Judiciary Committee Report seemed to contemplate -- and reject -- service on an embassy in its discussion of proposed methods of service under the FSIA:

> A second means [of service], of questionable validity, involves the mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state. Section 1608 precludes this method so as to avoid questions of inconsistency with section 1 of article 22 of the Vienna Convention on Diplomatic Relations, 23 UST 3227, TIAS 7502 (1972), which entered into force in the United States on December 13, 1972. Service on an embassy by mail would be precluded under this bill. *See* 71 Dept. of State Bull. 458-59 (1974).

H.R. Rep. No. 94-1487, at 26 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6625. This report, though, fails to make the distinction at issue in the instant case, between "[s]ervice *on* an embassy by mail," *id.* (emphasis added), and service on a minister of foreign affairs *via* or *care of* an embassy. The House Report suggests that § 1608 precludes service on an embassy to prevent any inconsistency with the Vienna Convention on Diplomatic Relations, Apr. 18, 1961,

23 U.S.T. 3227 (entered into force in United States Dec. 13, 1972) [hereinafter Vienna Convention]. The relevant sections of the Vienna Convention say only that "[t]he premises of the mission shall be inviolable," and that "[a] diplomatic agent shall . . . . enjoy immunity from [the host state's] civil and administrative jurisdiction." *Id.* arts. 22, 31. In a case where the suit is not against the embassy or diplomatic agent, but against the foreign state with service on the foreign minister *via* the embassy address, we do not see how principles of mission inviolability and diplomatic immunity are implicated. Moreover, Sudan has not sought to rely on this legislative history.

In this case, service was directed to the right individual, using the Sudanese Embassy address for transmittal. Process was not served on the foreign mission; rather, process was served on the Minister of Foreign Affairs via the foreign mission. The requirement advanced by Sudan, that service be mailed directly to a ministry of foreign affairs in the foreign country, makes little sense from a reliability perspective and as a matter of policy. While direct mailing relies on the capacity of the foreign postal service or a commercial carrier, mail addressed to an embassy -- as an extension of the foreign state -- can be forwarded to the minister by diplomatic pouch. *See Rux,* 2005 WL 2086202, at *16 (addressing the "inherent reliability and security associated with diplomatic pouches," which, "unlike the United States Postal Service, DHL, or any other commercial carrier, is accorded heightened protection under international law to ensure safe and uncompromised delivery of

documents between countries." (citing Vienna Convention, art. 27)).

We conclude that plaintiffs complied with the plain language of the FSIA's service of process requirements at 28 U.S.C. § 1608(a)(3).

Finally, though not well developed in its brief, we construe Sudan as also raising a question as to whether service was proper in the turnover proceedings. Because we have found that service of the default judgment in the underlying D.C. District Court case was proper, Sudan's argument fails. *See* 28 U.S.C. § 1608(e) ("A copy of [the] default judgment shall be sent to the foreign state . . . in the manner prescribed for service in this section."); *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1130 (9th Cir. 2010) ("The FSIA is quite clear what a plaintiff must serve on a foreign state before a court may enforce a default judgment against that state: the default judgment. Service of post-judgment motions is not required."); *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 747-49 (7th Cir. 2007) (holding that the federal rules for service applied because the FSIA's service provisions do not cover post-judgment motions).

Here, plaintiffs served all three turnover petitions at issue, as well as their Motion for Entry of Order Finding Sufficient Time Has Passed to Seek Attachment and Execution of Defendant / Judgment Debtor's Assets, by U.S. mail addressed to Sudan's new Minister of Foreign Affairs, Ali Ahmed Karti, via the Embassy of Sudan in Washington. Service of these post-judgment motions was not governed by the heightened standards of § 1608(a), and was required

to adhere only to the notice provisions of the federal rules, with which plaintiffs complied. *See* Fed. R. Civ. P. 5(a)(2) ("No service is required on a party who is in default for failing to appear. But a pleading that asserts a new claim for relief against such a party must be served on that party under Rule 4."); Fed. R. Civ. P. 5(b)(2)(C) ("A paper is served" by "mailing it to the person's last known address -- in which event service is complete upon mailing.").

B. Attachment of Assets Without an OFAC License or Case-Specific DOJ Statement of Interest

Sudan contends that the District Court erred in ordering the turnover of sanctions-controlled assets without first procuring either an OFAC license or a case-specific DOJ Statement of Interest stating that no OFAC license was necessary. We disagree. The government has made its position known through previous Statements of Interest that judgment holders under the Terrorism Risk Insurance Act of 2002 (the "TRIA"), 28 U.S.C. § 1610 note, are exempt from the normal OFAC licensure requirement, and the government's position is not limited to the cases in which it filed the Statements.

Section 1605 of the FSIA creates exceptions to the general blanket immunity of foreign states from the jurisdiction of U.S. courts, including the "terrorism exception," 28 U.S.C. § 1605A, which Congress added to the FSIA in 1996 to "give American Citizens an important economic and financial weapon against . . . outlaw states" that sponsor terrorism. H.R. Rep. No. 104-383, at 62 (1995). This exception allows courts to hear claims against foreign states designated by the

State Department as "state sponsor[s] of terrorism." *See Calderon-Cardona v. Bank of N.Y. Mellon,* 770 F.3d 993, 996 (2d Cir. 2014).[6]

In an effort to further aid victims of terrorism in satisfying judgments against foreign sponsors of terrorism, Congress enacted the TRIA, the purpose of which is to "deal comprehensively with the problem of enforcement of judgments rendered on behalf of victims of terrorism in any court of competent jurisdiction by enabling them to satisfy such judgments through the attachment of blocked assets of terrorist parties." *Weininger v. Castro,* 462 F. Supp. 2d 457, 483 (S.D.N.Y. 2006) (quoting H.R. Rep. No. 107-779, at 27 (2002)). Section 201(a) of the TRIA, which governs post-judgment attachment in some terrorism cases, provides, in relevant part:

> Notwithstanding any other provision of law..., in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605A or 1605(a)(7) (as such section was in effect on January 27, 2008) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to

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[6] The State Department currently designates Iran, Sudan, and Syria as state sponsors of terrorism. Sudan has been designated as such since August 12, 1993. U.S. Dep't of State, *State Sponsors of Terrorism,* http://www.state.gov/j/ct/list/c14151.htm (last visited Sept. 22, 2015).

> satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

TRIA § 201(a) (codified at 28 U.S.C. § 1610 note).

Sudanese assets in the United States are subject to just such a block, pursuant to sanctions that began with Executive Order 13067 in 1997 and are now administered by OFAC and codified at 31 C.F.R. Part 538. Ordinarily, unless a plaintiff obtains a license from OFAC, he is barred from attaching assets that are frozen under such sanctions regimes. *See Estate of Heiser v. Bank of Tokyo Mitsubishi UFJ, N.Y. Branch*, 919 F. Supp. 2d 411, 422 (S.D.N.Y. 2013).[7] Nonetheless, barring any contrary authority, a court will accept that no OFAC license is required on the authority of a DOJ Statement of Interest filed pursuant to 28 U.S.C. § 517. *Id.* at 423.

The question, then, is whether § 201(a) of the TRIA and § 1610(g) of the FSIA, which authorize the execution of § 1605A judgments against state sponsors of terrorism, permit a § 1605A judgment holder to attach blocked Sudanese assets without a license from OFAC. The government, in previous

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[7] In the case of Sudan, there are two relevant provisions that forbid the attachment of blocked assets. *See* 31 C.F.R. § 538.201(a) ("Except as authorized by regulations, orders, directives, rulings, instructions, licenses, or otherwise, no property or interests in property of the Government of Sudan, that are in the United States . . . may be transferred . . . ."); 31 C.F.R. § 538.313 ("The term *transfer* means . . . the issuance, docketing, filing, or levy of or under any judgment, decree, attachment, injunction, execution, or other judicial or administrative process or order, or the service of any garnishment . . . ." (emphasis added)).

Statements of Interest, has answered this question in the affirmative.

In *Weininger,* plaintiffs obtained a default judgment against Cuba and sought turnover of funds blocked pursuant to the Cuban Assets Control Regulations, held by a garnishee bank. 462 F. Supp. 2d at 499. The bank petitioned for interpleader relief. In a Statement of Interest filed with the district court, the DOJ indicated that "[i]n the event the Court determines that the funds are subject to TRIA, the funds may be distributed without a license from the Office of Foreign Assets Control." *Id.* (alteration in original) (quoting DOJ Ltr., Jan. 6, 2006).

Several years later, in the D.C. District Court, the DOJ filed a Statement of Interest that, while primarily addressing a different question, took the position that "when a blocked asset comes within TRIA's scope, TRIA generally overrides OFAC's regulations requiring that a license be obtained before the asset is attached." *Estate of Heiser v. Islamic Republic of Iran,* No. 00-CV-2329, 807 F. Supp. 2d 9 (D.D.C. 2011) (Docket No. 230).

Finally, in a related case, *Bank of Tokyo,* the government yet again reiterated its position in a Statement of Interest filed with the district court. 919 F. Supp. 2d at 422-23. In *Bank of Tokyo,* petitioners were family members and the estates of seventeen Air Force servicemembers killed in the 1996 Khobar Towers bombing in Saudi Arabia, and sought to satisfy the D.C. District Court judgment against the Islamic Republic of Iran by compelling respondent banks in New York to relinquish sanctions-blocked funds. The district court held that petitioners were

entitled to attachment of Iran's assets, relying in part on the letter from the U.S. Attorney's Office. The Statement of Interest explicitly noted that the DOJ had previously addressed this issue in another public filing, in *Weininger,* 462 F. Supp. 2d 457. The district court noted that it "is aware of no contrary authority that would require an OFAC license in this instance. It accepts the Statement of Interest's assertion that no OFAC license is required." *Bank of Tokyo,* 919 F. Supp. 2d at 423.

Sudan contends that unlike in *Bank of Tokyo,* the District Court in the instant case did not seek a Statement of Interest before issuing the turnover order. While it is true that the District Court did not explicitly seek a new case-specific Statement from DOJ, it relied on the persuasive authority of the previous Statements on the issue. In the December 12, 2013, December 13, 2013, and January 6, 2014 turnover orders, the District Court wrote that "[a]n OFAC license is not necessary to disburse these funds and no notice is necessary to the Sudanese agencies and instrumentalities." J. App. at 67, 73, 78 (citing *Bank of Tokyo,* 919 F.Supp. 2d at 422; *Heiser v. Islamic Republic of Iran,* 807 F.Supp. 2d at 23; *Weininger,* 462 F.Supp. 2d 457).

Sudan points to no authority that requires a court to seek a new Statement of Interest in every case in which this issue arises. Unless or until the United States changes its position, the *Weininger* and *Heiser* Statements of Interests represent the government's clear intent to exempt TRIA judgment holders from sanctions regime OFAC licensure requirements. Because we find that the District Court properly relied on the *Weininger* and *Heiser* letters, we need

not reach appellees' alternative argument for affirmance, that as a matter of law, even without recourse to a Statement of Interest, an OFAC license is unnecessary to distribute blocked assets to a TRIA judgment holder. *See, e.g., Rubin v. Islamic Republic of Iran,* 709 F.3d 49, 54 (1st Cir. 2013) ("TRIA thereby allows a person to circumvent the normal process for attaching assets that are blocked under a sanctions program, which entails obtaining a license from OFAC.").

Once a district court determines that blocked assets are subject to the TRIA, those funds may be distributed without a license from OFAC. Plaintiffs in this case obtained an underlying § 1605A terrorism judgment from the D.C. District Court and properly domesticated that judgment in the Southern District of New York, asserting a right to execute against Sudan's assets pursuant to the TRIA and 28 U.S.C. § 1610(g). The turnover orders then properly issued.

CONCLUSION

For the foregoing reasons, the orders of the district court are **AFFIRMED**.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed: 09/23/2015]

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of September, two thousand and fifteen.

Before:

Gerard E. Lynch, Denny Chin, *Circuit Judges*,
Edward R. Korman, *District Judge*.*

Rick Harrison, John Buckley, III, Margaret Lopez, Andy Lopez, Keith Lorensen, Lisa Lorensen, Edward Love, Robert McTureous, David Morales, Gina Morris, Martin Songer, Jr., Shelly Songer, Jeremy Stewart, Kesha Stidham, Aaron Toneym, Eric Williams, Carl Wingate, Tracey Smith, as personal representative of the Estate of Rubin Smith,

Plaintiffs-Appellees,

v.

Republic of Sudan,

Defendant-Appellant,

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* The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

Advanced Chemical Works, AKA Advanced Commercial and Chemical Works Company Limited, AKA Advanced Training and Chemical Works Company Limited, Accounts & Electronics Equipments, AKA Accounts and Electronics Equipments, et al.,

Defendants,

National Bank of Egypt, Credit Agricole Corporate and Investment Bank,

Respondents.

ORDER
Docket No. 14-121

The appeal in the above captioned case from three orders of the United States District Court for the Southern District of New York was argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the orders of the district court are AFFIRMED.

For The Court:

/s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe,
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed: 11/06/2015]

Docket No. 14-121

RICK HARRISON, JOHN BUCKLEY, III, MARGARET LOPEZ, ANDY LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARD LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA,

(Caption continued on inside cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE REPUBLIC OF SUDAN'S PETITION FOR PANEL REHEARING OR REHEARING IN BANC

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MORRIS, MARTIN SONGER, JR., SHELLY SONGER, JEREMY STEWART, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE, TRACEY SMITH, as personal representative of the ESTATE OF RUBIN SMITH,

Plaintiffs-Appellees,

v.

REPUBLIC OF SUDAN,

Defendant-Appellant,

ADVANCED CHEMICAL WORKS, aka ADVANCED COMMERCIAL AND CHEMICAL WORKS COMPANY LIMITED, aka ADVANCED TRAINING AND CHEMICAL WORKS COMPANY LIMITED, ACCOUNTS & ELECTRONICS EQUIPMENTS, aka ACCOUNTS AND ELECTRONIC EQUIPMENTS, *et al.*,

Defendants,

NATIONAL BANK OF EGYPT, CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK, *et al.*,

Respondents.

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Interest of the United States

The panel construed the Foreign Sovereign Immunities Act ("FSIA") to allow service on a foreign sovereign via its embassy in the United States if the papers are addressed to the foreign minister. That holding runs contrary to the FSIA's text and history, and is inconsistent with the United States' international treaty obligations and international practice. The United States has a substantial interest in ensuring that foreign states are served properly before they are required to appear in U.S. courts, and preserving the inviolability of diplomatic missions under the Vienna Convention on Diplomatic Relations ("VCDR"). Moreover, the government routinely objects to attempts by foreign courts and litigants to serve the U.S. government by direct delivery to an American embassy, and thus has a significant reciprocity interest in the treatment of U.S. missions abroad. The United States deeply sympathizes with the extraordinary injuries to the U.S. military personnel and their spouses who brought this suit, and condemns the terrorist acts that caused those injuries. Nevertheless, because of the government's interest in the proper application of rules regarding service of process on foreign states, as well as significant reciprocity concerns, the United States submits this brief as *amicus curiae* pursuant to Federal Rule of Appellate Procedure 29(a) in support of rehearing.

ARGUMENT

Point I – The Panel Incorrectly Permitted Service Through a Foreign State's Embassy

The panel incorrectly construed § 1608(a)(3) of the FSIA to permit service upon foreign states by allowing U.S. courts to enlist foreign diplomatic facilities in the U.S. as agents for delivery to those sovereigns' foreign ministers. That method of service contradicts the FSIA's text and history, and is inconsistent with the United States' international obligations.

The FSIA sets out the exclusive procedures for service of a summons and complaint on a foreign state and provides that, if service cannot be made by other methods, the papers may be served "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. § 1608(a)(3). The most natural understanding of that text is that the mail will be sent to the head of the ministry of foreign affairs at his or her regular place of work—i.e., at the ministry of foreign affairs in the state's seat of government—not to some other location for forwarding. *See, e.g., Barot v. Embassy of Republic of Zambia*, 785 F.3d 26, 30 (D.C. Cir. 2015) (directing

service to be sent to foreign minister in state's capital city).[1]

The panel observed that § 1608(a)(3) does not expressly specify a place of delivery for service on a foreign minister, and assumed that mailing to the embassy "could reasonably be expected to result in delivery to the intended person." (Slip op. 13). But the FSIA's service provisions "can only be satisfied by strict compliance." *Magness v. Russian Fed'n*, 247 F.3d 609, 615 (5th Cir. 2001); *accord Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994). It is inconsistent with a rule of strict compliance to permit papers to be mailed to the foreign minister at a place other than the foreign ministry, even if the mailing is nominally addressed to that person, based on the assumption it will be forwarded.

The Court supported its conclusion by contrasting § 1608(a)(3)'s silence regarding the specific address for mailing with § 1608(a)(4)'s provision that papers be mailed to the U.S. Secretary of State "in Washington, [D.C.]," and inferring that Congress therefore did not intend to require mailing the foreign minister at any particular location. (Slip op. 12). But a separate contrast in the statute undermines that conclusion. For service on a foreign state agency or

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[1] Thus, a witness in congressional hearings described § 1608(a)(3) as requiring service by "mail to the foreign minister at the foreign state's seat of government." Hearings on H.R. 11315 Before Subcomm. on Admin. Law and Gov't Rels. of House Comm. on Judiciary (June 4, 1976) (testimony of M. Cohen).

instrumentality, Congress expressly provided for service by delivery to an "officer, a managing or general agent, or to any other [authorized] agent." § 1608(b)(2). In contrast, for service on the foreign state itself, Congress omitted any reference to an officer or agent. *Id.* § 1608(a). That difference strongly suggests that Congress did not intend to allow service on a foreign state via delivery to any entity that could, by analogy, be considered the foreign state's officer or agent, including the state's embassy, even if only for purposes of forwarding papers to the foreign ministry.

The FSIA's legislative history makes clear that Congress did not intend for service to be made via direct delivery to an embassy, and spells out significant legal and policy concerns with such an approach. The panel acknowledged that the relevant House report explicitly stated that "'[s]ervice on an embassy by mail would be precluded under this bill.'" (Slip op. 15-16 (quoting H.R. Rep. No. 94-1487, at 26 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6625)). The panel was persuaded that this language did not reflect Congress's intent to preclude service by delivery to a foreign minister "*via* or *care of* an embassy," as opposed to precluding service "on" the embassy if, for example, the suit is against the embassy. But suits against diplomatic missions are also suits against foreign states for purposes of the FSIA, *see Gray v. Permanent Mission of People's Republic of Congo*, 443 F. Supp. 816 (S.D.N.Y. 1978), *aff'd*, 580 F.2d 1044 (2d Cir. 1978), and there is no rationale for prohibiting service of papers at an

embassy only in cases where the embassy is the named defendant.

Additional legislative history confirms that Congress was concerned about allowing foreign states to be served at their embassies. Early drafts of the FSIA provided for mailing papers to foreign ambassadors in the United States as the primary means of service on a foreign state. *See* S. 566, 93rd Cong. (1973); H.R. 3493, 93rd Cong. (1973). But, at the urging of the State Department, Congress removed any reference to ambassadors from the final service provisions, to "minimize potential irritants to relations with foreign states," particularly in light of concerns about the inviolability of embassy premises under the VCDR. H.R. Rep. No. 94-1487, at 11, 26.

Indeed, the panel's decision is contrary to the principle of mission inviolability and the United States' treaty obligations. The VCDR provides that "the premises of the mission shall be inviolable." 23 U.S.T. 3227, 500 U.N.T.S. 95, art. 22. As this Court has correctly concluded in an analogous context, this principle must be construed broadly, and is violated by service of process—whether on the inviolable diplomat or mission for itself or "as agent of a foreign government." *Tachiona v. United States*, 386 F.3d 205, 222, 224 (2d Cir. 2004); *accord Autotech Tech. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 748 (7th Cir. 2007) ("service *through* an embassy is expressly banned" by VCDR and "not authorized" by FSIA (emphasis added)); *see 767 Third Ave. Assocs. v. Permanent Mission of Zaire*, 988 F.2d 295, 301 (2d Cir. 1993) (approvingly noting commentator's view that "process servers may not even serve papers

without entering at the door of a mission because that would 'constitute an infringement of the respect due to the mission' "); Brownlie, *Principles of Public Int'l Law* 403 (8th ed. 2008) ("writs may not be served, even by post, within the premises of a mission but only through the local Ministry for Foreign Affairs."). The intrusion on a foreign embassy is present whether it is the ultimate recipient or merely the conduit of a summons and complaint.

The panel's contrary conclusion also improperly allows U.S. courts to treat the foreign embassy as a forwarding agent, diverting its resources to determine the significance of the transmission from the U.S. court, and to assess whether or how to respond. The panel assumed that the papers would be forwarded on to the foreign minister via diplomatic pouch, which is provided with certain protections under the VCDR to ensure the safe delivery of "diplomatic documents and articles intended for official use." VCDR, art 27. But one sovereign cannot dictate the internal procedures of the embassy of another sovereign, and a foreign government may well object to a U.S. court instructing it to use its pouch to deliver items to its officials on behalf of a third party.

Finally, the United States has strong reciprocity interests at stake. The United States has long maintained that it may only be served through diplomatic channels or in accordance with an applicable international convention or other agreed-upon method. Thus, the United States consistently rejects attempted service via direct delivery to a U.S. embassy abroad. When a foreign court or litigant

purports to serve the United States through an embassy, the embassy sends a diplomatic note to the foreign government indicating that the United States does not consider itself to have been served properly and thus will not appear in the case or honor any judgment that may be entered. That position is consistent with international practice. *See* U.N. Convention on Jurisdictional Immunities of States and Their Property, UN Doc. A/ 59/508 (2004), art. 22 (requiring service through international convention, diplomatic channels, or agreed-upon method); European Convention on State Immunity, 1495 U.N.T.S. 181 (1972), art. 16 (service exclusively through diplomatic channels); U.K. State Immunity Act, 1978 c.33 (same). If the FSIA were interpreted to permit U.S. courts to serve papers through an embassy, it could make the United States vulnerable to similar treatment in foreign courts, contrary to the government's consistently asserted view of the law. *See, e.g., Medellin v. Texas*, 552 U.S. 491, 524 (2008) (U.S. interests including "ensuring the reciprocal observance of the Vienna Convention [on Consular Relations]" are "plainly compelling"); *Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1295 (11th Cir. 1995) (FSIA's purposes include "according foreign sovereigns treatment in U.S. courts that is similar to the treatment the United States would prefer to receive in foreign courts").

Point II—The FSIA Does Not Override the Requirement of an OFAC License

Although Sudan's petition for rehearing does not rely on this issue, the panel also erred in suggesting

plaintiffs need not obtain an OFAC license before executing upon blocked assets under the FSIA.

As the panel noted (slip op. 22-23), the United States has repeatedly taken the position that section 201(a) of the Terrorism Risk Insurance Act ("TRIA") permits a person holding a judgment under 28 U.S.C. § 1605A to attach assets that have been blocked pursuant to certain economic sanctions laws, without obtaining an OFAC license. That position rests on the terms of TRIA, which permits attachment of blocked assets in specified circumstances "[n]otwithstanding any other provision of law." TRIA § 201(a).

But the panel erroneously applied the same construction to § 1610(g) of the FSIA. (Slip op. 22 (addressing "whether § 201(a) of the TRIA *and § 1610(g) of the FSIA*" permit § 1605A judgment holder to attach blocked assets without OFAC license) (emphasis added), 25 (turnover proper because execution sought "pursuant to the TRIA and 28 U.S.C. § 1610(g)")). As the United States has previously stated, where "funds at issue fall outside TRIA but somehow are attachable by operation of the FSIA alone . . . an OFAC license would be required before the funds could be transferred to plaintiffs." Statement of Interest of United States, *Wyatt v. Syrian Arab Republic*, No. 08 Civ. 502 (D.D.C. Jan. 23, 2015), at 18. While § 1610(g)(2) provides that certain property of a foreign state "shall not be immune from attachment," that language, consistent with the paragraph's title ("United States sovereign immunity inapplicable"), merely removes a defense of sovereign immunity. Section 1610(g) lacks TRIA's broad "notwithstanding any other provision"

language, and does not override other applicable rules such as the need for an OFAC license. *See* 31 C.F.R. §§ 538.201(a), 538.313.

Dated: New York, New York
November 6, 2015

Respectfully submitted,

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United States Attorney for the Southern District of New York, Attorney for United States of America as Amicus Curiae.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Argued: 03/11/2016

Decided: 09/22/2016]

August Term 2015

Docket No: 14-121-cv

RICK HARRISON, JOHN BUCKLEY, III, MARGARET LOPEZ, ANDY LOPEZ, KEITH LORENSEN, LISA LORENSEN, EDWARD LOVE, ROBERT MCTUREOUS, DAVID MORALES, GINA MORRIS, MARTIN SONGER, JR., SHELLY SONGER, JEREMY STEWART, KESHA STIDHAM, AARON TONEY, ERIC WILLIAMS, CARL WINGATE, TRACEY SMITH, as personal representative of the Estate of Rubin Smith,

Plaintiffs-Appellees,

v.

REPUBLIC OF SUDAN,

Defendant-Appellant,

ADVANCED CHEMICAL WORKS, AKA Advanced Commercial and Chemical Works Company Limited, AKA Advanced Training and Chemical Works Company Limited, Accounts & Electronics Equipments, AKA Accounts and Electronics Equipments, et al.,

Defendants,

NATIONAL BANK OF EGYPT, CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK,

Respondents.

ON PETITION FOR REHEARING

Before:

LYNCH and CHIN, *Circuit Judges,*
and KORMAN, *District Judge.*[1]

The Republic of Sudan petitions for panel rehearing or rehearing *en banc* of this Court's decision holding that service of process on the Minister of Foreign Affairs via the Sudanese Embassy in Washington, D.C., was sufficient to meet the requirements of the Foreign Sovereign Immunities Act (the "FSIA"). The United States, as *amicus curiae,* supports the Republic of Sudan and seeks clarification on the issue of whether § 1610(g) of the FSIA overrides the requirement of a license from the Treasury Department's Office of Foreign Assets Control. The petition is DENIED to the extent it seeks panel rehearing.

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[1] The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

ANDREW C. HALL (Roarke Maxwell, *on the brief*), Hall, Lamb and Hall, P.A., Miami, Florida, *for Plaintiffs-Appellees.*

CHRISTOPHER M. CURRAN, (Nicole Erb, Claire A. DeLelle, *on the brief*), White & Case LLP, Washington, D.C. *for Defendant-Appellant.*

DAVID S. JONES, Assistant United States Attorney (Benjamin H. Torrance, Assistant United States Attorney, *on the brief*), *for* Preet Bharara, United States Attorney for the Southern District of New York, New York, New York, *for the United States of America as* Amicus Curiae.

CHIN, *Circuit Judge*:

On September 23, 2015, we affirmed three orders of the United States District Court for the Southern District of New York (Torres, *J.*) directing certain banks to turnover assets of defendant-appellant Republic of Sudan ("Sudan") to satisfy a judgment entered in favor of plaintiffs against Sudan in the United States District Court for the District of Columbia (the "D.C. District Court"), in the amount of $314,705,896. Sudan petitions for panel rehearing or rehearing *en banc*, supported by the United States of America, as *amicus curiae*.

After further briefing and argument, upon due consideration, we adhere to our decision to affirm. The petition is DENIED to the extent it seeks panel rehearing.

BACKGROUND

The facts and procedural history are set forth in our September 23, 2015 opinion, familiarity with which is assumed. *See Harrison v. Republic of Sudan*, 802 F.3d 399 (2d Cir. 2015) (the "Panel Opinion"). We summarize the background as follows:

This case arises from the bombing of the U.S.S. Cole in the port of Aden, Yemen, in 2000. Sailors and spouses of sailors injured in the explosion brought suit against Sudan in the D.C. District Court under the FSIA, 28 U.S.C. §§ 1130, 1602 *et seq.*, alleging that al Qaeda was responsible for the attack and that Sudan had provided material support to al Qaeda.

The action was commenced in October 2010, and, at plaintiffs' request, the Clerk of the D.C. District Court served the summons and complaint on Sudan in November 2010 by mailing the papers to the Minister of Foreign Affairs of Sudan via the Sudanese Embassy in Washington, D.C. The papers were sent via registered mail, return receipt requested to:

Republic of Sudan
Deng Alor Koul
Minister of Foreign Affairs
Embassy of the Republic of Sudan
2210 Massachusetts Avenue NW
Washington, DC 2008

As represented by plaintiffs, Deng Alor Koul was the Minister of Foreign Affairs of Sudan at the time.

On November 17, 2010, the Clerk of Court entered a Certificate of Mailing certifying that the summons and complaint were sent via domestic certified mail to the "head of the ministry of foreign affairs," via the

Sudanese Embassy in Washington, D.C., and that the return receipt was returned to the Clerk of Court and received on November 23, 2010. No attempt was made to serve Sudan by mail to the address of the Ministry of Foreign Affairs in Khartoum, the capital. Sudan failed to serve an answer or other responsive pleading within sixty days after plaintiffs' service, *see* 28 U.S.C. § 1608(d), and the Clerk of Court thus entered a default against Sudan.

On March 30, 2012, after a hearing, the D.C. District Court (Lamberth, *J.*) entered a default judgment against Sudan in the amount of $314,705,896, *Harrison v. Republic of Sudan*, 882 F. Supp. 2d 23, 51 (D.D.C. 2012), and found, *inter alia*, that service on Sudan had been proper, *id.* at 28. At the request of plaintiffs, on April 20, 2012, the Clerk of the Court mailed a copy of the default judgment by registered mail, return receipt requested, to Sudan's Minister of Foreign Affairs, via the Sudanese Embassy in Washington, D.C. While it does not appear that the receipt was returned, plaintiffs submitted proof that the mailing was delivered.

The judgment was thereafter registered in the Southern District of New York. In December 2013 and January 2014, the Southern District issued three turnover orders, directing certain banks to turnover assets of Sudan to plaintiffs. It was only after the last of these three turnover orders was entered that Sudan finally filed a notice of appearance, on January 13, 2014. The same day, Sudan appealed the turnover orders to this Court.[1]

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[1] Nearly a year and a half later, after this appeal had been argued and while the appeal was pending, Sudan made a Rule

In affirming the turnover orders, we held that service of process on the Minister of Foreign Affairs via the Sudanese Embassy in Washington, D.C., was sufficient to meet the requirements of the FSIA. *Harrison*, 802 F.3d at 406. We also held that the District Court did not err in issuing the turnover orders without first obtaining a license from the Treasury Department's Office of Foreign Assets Control ("OFAC") or a Statement of Interest from the Department of Justice. *Id.* at 407.

On October 7, 2015, Sudan filed this petition for panel rehearing or rehearing *en banc*. Although it had not appeared in the earlier proceedings, the United States filed an *amicus* brief in support of the petition on November 6, 2015. After further briefing, we heard argument on March 11, 2016. We now deny the petition to the extent it seeks panel rehearing.

DISCUSSION

Sudan and the United States argue that the Panel Opinion misinterprets § 1608(a)(3) of the FSIA and puts the United States in violation of its obligations under the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227 (entered into force in United States Dec. 13, 1972) [hereinafter "Vienna Convention"]. In its reply brief, Sudan also makes the factual argument that the summons and complaint were not actually delivered to the embassy. Finally, as to the issue of the requirement of an

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60(b) motion in the D.C. District Court to set aside the default judgment. Motion to Vacate Memorandum & Opinion, *Harrison v. Republic of Sudan*, No. 1:10-cv-01689-RCL (D.D.C. June 14, 2015), ECF No. 55. That court has not yet decided that motion.

OFAC license, the United States argues that the FSIA does not override the requirement of an OFAC license. We address each of these issues in turn.

I. Interpretation of § 1608(a)(3)

Sudan and the United States argue that the Panel Opinion incorrectly interprets § 1608(a)(3) of the FSIA. We acknowledge that the statutory interpretation question presents a close call, and that the language of § 1608(a)(3) is not completely clear. Nonetheless, for the reasons discussed below, we believe, as a matter of statutory construction, that the better reading of the statute favors plaintiffs' position. Accordingly, we adhere to our prior decision.

A. The Plain Language

The "starting point in statutory interpretation is the statute's plain meaning, if it has one." *United States v. Dauray,* 215 F.3d 257, 260 (2d Cir. 2000). Section 1608(a)(3) of the FSIA reads: "Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state . . . by sending a copy of the summons and complaint and a notice of suit . . . to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. § 1608(a)(3).[2]

On its face, the statute does not specify a location where the papers are to be sent; it specifies only that the papers are to be addressed and dispatched to the head of the ministry of foreign affairs. Nothing in

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[2] As we discuss in the Panel Opinion, the FSIA provides for four methods of service. *Harrison,* 802 F.3d at 403. The method set forth in § 1608(a)(3) is the method at issue in this case.

§ 1608(a)(3) requires that the papers be mailed to a location in the foreign state, or indeed to any particular address, and nothing in the statute precluded the method chosen by plaintiffs. A mailing addressed to the minister of foreign affairs via Sudan's embassy in Washington, D.C., was consistent with the language of the statute and could reasonably be expected to result in delivery to the intended person.[3] Plaintiffs literally complied with the statute -- they sent a copy of the summons and complaint addressed to the head of the ministry of foreign affairs of Sudan.

The statute does not specify that the mailing be sent to the head of the ministry of foreign affairs *in* the foreign country. If Congress had wanted to

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[3] An embassy is a logical place to direct a communication intended to reach a foreign country. As explained by the United States State Department, "an embassy is the nerve center for a country's diplomatic affairs within the borders of another nation, serving as the headquarters of the chief of mission, staff and other agencies." Diplomacy 101, What Is a U.S. Embassy?, http://diplomacy.state.gov/discoverdiplomacy/diplomacy101/places/170537.htm; *see also Rux v. Republic of Sudan*, No. Civ.A. 2:04CV428, 2005 WL 2086202, at *16 (E.D. Va. Aug. 26, 2005), *aff'd on other grounds*, 461 F.3d 461 (4th Cir. 2006) (underscoring the "inherent reliability and security associated with diplomatic pouches," which, "unlike the United States Postal Service, DHL, or any other commercial carrier, is accorded heightened protection under international law to ensure safe and uncompromised delivery of documents between countries" (citing Vienna Convention, art. 27)). We do not suggest that service could be made on a minister of foreign affairs via other offices in the United States or another country maintained by the country in question, such as, *e.g.*, a consular office, the country's mission to the United Nations, or a tourism office.

require that the mailing be sent to the minister of foreign affairs at the principal office of the ministry in the foreign country, it could have said so -- but it did not. *See Burrage v. United States*, 134 S. Ct. 881, 892 (2014) ("The role of this Court is to apply the statute as it is written—even if we think some other approach might 'accor[d] with good policy.'") (quoting *Commissioner v. Lundy*, 516 U.S. 235, 252 (1996)); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176 (1994) (rejecting argument that aiding and abetting liability existed because Congress did not use words "aid" and "abet" in statutory text and noting that "Congress knew how to impose aiding and abetting liability when it chose to do so"). In § 1608(a)(4), for example, Congress specified that the papers be mailed "to the Secretary of State *in Washington, District of Columbia*, to the attention of the Director of Special Consular Services," for transmittal to the foreign state "through diplomatic channels." 28 U.S.C. § 1608(a)(4) (emphasis added).

The United States argues that the FSIA's service provisions require strict compliance, and that mailing the papers to "the foreign minister at a place other than the foreign ministry" is not authorized by the statute. Amicus Br. of the United States at 3. The United States argues that "[t]he most natural understanding of [the statute's] text is that the mail will be sent to the head of the ministry of foreign affairs at his or her regular place of work -- *i.e.*, at the ministry of foreign affairs in the state's seat of government." *Id.* at 2. This argument is unpersuasive, as it would require us to read the words "at his or her regular place of work" or "at the

state's seat of government" into the statute. *See Dean v. United States*, 556 U.S. 568, 572 (2009) (courts must "ordinarily resist reading words or elements into a statute that do not appear on its face") (quoting *Bates v. United States*, 522 U.S. 23, 29 (1997)).

The United States argues that our reading of § 1608(a)(3) is undermined by other provisions in the statute. It argues that because the FSIA permits the use of an authorized agent only in the context of service under § 1608(b)(2) -- the provision that deals with service on foreign state agencies and instrumentalities -- we should infer that "Congress did not intend to allow service on a foreign state via delivery to any entity that could, by analogy, be considered the foreign state's officer or agent, including the state's embassy." Amicus Br. of the United States at 3. This argument rests on the premise that the Panel Opinion requires an embassy to act as an agent of a foreign state. We did not so hold, and, to the extent there is any doubt, we now clarify.

We do not hold that an embassy is an agent for service or a proxy for service for a foreign state. There is a significant difference between *serving process* on an embassy, and mailing papers to a country's foreign ministry *via* the embassy. Here, the summons and complaint were addressed to the Sudanese Minister of Foreign Affairs, by name and title, at the Sudanese Embassy. The embassy accepted the papers, signing for them and sending back a return receipt to the Clerk of Court.[4] The embassy could have rejected the

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[4] In its reply brief on its petition for rehearing, Sudan argues for the first time in this nearly six-year old litigation that in fact

mailing, but instead it accepted the papers and then explicitly acknowledged receipt. Accordingly, the papers were not served on the embassy as a proxy or agent for Sudan, but they were instead mailed to the Minister of Foreign Affairs, in the most natural way possible -- addressed to him, by name, via Sudan's embassy.

In short, while the language of the statute is not wholly unambiguous, we believe that the better reading is that it did not require service on the foreign minister at his or her regular place of work or in the state's seat of government. Hence, service on the foreign minister via the embassy was not inconsistent with the wording of the statute.

B. Legislative History

We turn to the legislative history to see whether it sheds light on the statutory interpretation question

As we noted in the Panel Opinion, while the 1976 House Judiciary Committee Report makes clear that the statute does not permit service by "the mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state," see H.R. Rep. No. 94-1487, at 26 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6625, it does not address the question of mailing the papers to the minister of foreign affairs via or care of an embassy. The Report provides,

> Special note should be made of two means which are currently in use in attempting to commence litigation against a foreign state

---

the embassy did not receive the papers. We discuss this issue below.

> ...A second means, of questionable validity, involves the mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state. Section 1608 precludes this method so as to avoid questions of inconsistency with section 1 of article 22 of the Vienna Convention on Diplomatic Relations, 23 UST 3227, TIAS 7502 (1972), which entered into force in the United States on December 13, 1972. Service on an embassy by mail would be precluded under this bill. See 71 Dept. of State Bull. 458-59 (1974).

H.R. Rep. 94-1487, at 26.

As we noted in the Panel Opinion, the report fails to make the distinction at issue in the instant case, between "[s]ervice *on* an embassy by mail," *id.* (emphasis added), and service on a minister or foreign affairs *via* or *care of* an embassy. The legislative history does not address, any more than does the statutory text, whether Congress intended to permit the mailing of service to a foreign minister via an embassy. What it does make clear, however, is that Congress was concerned about the interaction of this provision and Article 22 of the Vienna Convention. Accordingly, we must consider the Vienna Convention, which we discuss below.

C. Judicial Interpretation

Before turning to the Vienna Convention, we consider the case law on the statutory interpretation issue.

As we noted in the Panel Opinion, we are not alone in our reading of § 1608(a)(3). In *Wye Oak*

Technology, Inc. v. Republic of Iraq, the Eastern District of Virginia held that "Section (a)(3) does not impose a requirement that an otherwise proper service package must be delivered to a particular destination." No. 1:09cv793, 2010 WL 2613323, at *5 (E.D. Va. June 29, 2010), *aff'd on other grounds*, 666 F.3d 205 (4th Cir. 2011). There, the court held that service via an embassy is sufficient to satisfy the FSIA as long as the service is directed to the Minister of Foreign Affairs. *Id.* at *5-6. The Eastern District of Virginia also so held in *Rux v. Republic of Sudan*. 2005 WL 2086202, at *16 ("The text of § 1608(a)(3) does not prohibit service on the Minister of Foreign Affairs at an embassy address. Indeed, the statute does not prescribe the place of service, only the person to whom process must be served."). It is true, as Sudan argues, that these were district court opinions, but Sudan has not cited any case, district court or otherwise, holding that the mailing of papers addressed to the minister of foreign affairs via an embassy does *not* comply with the statute.

None of the cases relied on by Sudan or the United States undermines our reading of § 1608(a)(3). In four of the cases, the plaintiffs served the papers on the embassy or the ambassador, without addressing them to the minister of foreign affairs. *See Barot v. Embassy of the Republic of Zambia*, 785 F.3d 26, 28-29 (D.C. Cir. 2015) (service package addressed to embassy); *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 741 (7th Cir. 2007) (no record of service but counsel submitted affidavit stating document had been served "on the embassy in Washington, D.C."); *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 253 (7th Cir. 1983)

(service package addressed to ambassador); *Ellenbogen v. The Canadian Embassy*, No. Civ.A. 05-01553JDB, 2005 WL 3211428, at *2 (D.D.C. Nov. 9, 2005) (service package addressed to embassy). Consequently, those plaintiffs did not comply with the statute.

In another case, we interpreted a different provision of the FSIA, § 1608(b)(2), and held that persons entitled to diplomatic immunity are not proper agents for service under the FSIA. *Tachiona v. United States*, 386 F.3d 205, 222 (2d Cir. 2004) (holding that § 1608(b)(2) does not authorize service on foreign officials present in United States as agents for a private political party). *Tachiona* did not address the issue before us. In two other cases, the opinions do not say to whom the papers were addressed. *See Lucchino v. Foreign Countries of Brazil, S. Korea, Spain, Mexico, & Argentina*, 631 F. Supp. 821, 826 (E.D. Pa. 1986); *40 D 6262 Realty Corp. v. United Arab Emirates Gov't*, 447 F. Supp. 711 (S.D.N.Y. 1978).

Section 1608(a)(3) explicitly provides that service on a foreign sovereign must be "*addressed* and dispatched by the clerk of the court *to* the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. § 1608(a)(3) (emphasis added). Cases involving mailings not so addressed are not controlling. We adhere to our conclusion that the plain language of § 1608(a)(3) does not foreclose the plaintiffs' method of service.

II. The Vienna Convention

Sudan and the United States contend that the Panel Opinion places the United States in violation of

the Vienna Convention. They contend that the Panel Opinion will complicate international relations by subjecting the United States (and other countries) to service of process via any of its diplomatic missions throughout the world, despite its long-standing policy to refuse such service. As a preliminary matter, we note that these arguments were not properly raised in Sudan's initial briefs. Nonetheless, we exercise our discretion to consider the arguments, and we reject them.

The FSIA is the sole basis for obtaining jurisdiction over a foreign state in the courts of the United States. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). As noted above, the "legislative history of the FSIA demonstrates unequivocally that the Act was not intended to affect the immunity of 'diplomatic or consular representatives,'" that was established under the Vienna Convention and customary international law. *Tachiona*, 386 F.3d at 222-23 (quoting H.R. Rep. 94-1487, at 21). "Under the terms of [the Vienna Convention], the United States, in its role as a receiving state of foreign missions, is obligated to protect and respect the premises of any foreign mission located within its sovereign territory." *Bennett v. Islamic Republic of Iran*, 604 F. Supp. 2d 152, 159 (D.D.C. 2009), *aff'd*, 618 F.3d 19 (D.C. Cir. 2010).

The Panel Opinion does not conflict with the Vienna Convention. The Vienna Convention provides that "[t]he premises of the mission shall be inviolable," and that "[a] diplomatic agent shall . . . enjoy immunity from [the host state's] civil and administrative jurisdiction." Vienna Convention, arts.

22, 31; *see also* H.R. Rep. 94-1487, at 26 ("Service on an embassy by mail would be precluded under this bill."). We acknowledge that these provisions preclude service of process on an embassy or diplomat as an agent of a foreign government, as there would be a breach of diplomatic immunity if an envoy were subjected to compulsory process. *See Tachiona*, 386 F.3d at 222 (noting that "the inviolability principle precludes service of process on a diplomat as agent of a foreign government"); *40 D 6262 Realty Corp.*, 447 F. Supp. at 712 (holding that the FSIA's legislative history makes clear that service by mail on an embassy is precluded under the Act). Accordingly, service on an embassy or consular official would be improper. But that is not what happened here. Rather, process was served on the Minister of Foreign Affairs at the foreign mission and not on the foreign mission itself or the ambassador. The papers were specifically addressed to the Minister of Foreign Affairs via the embassy, and the embassy sent back a return receipt acknowledging receipt of the papers.

The United States explains that it "consistently rejects attempted service via direct delivery to a U.S. embassy abroad. When a foreign court or litigant purports to serve the United States through an embassy, the embassy sends a diplomatic note to the foreign government indicating that the United States does not consider itself to have been served properly." Amicus Br. of the United States at 6. Our holding does not affect this policy. We do not preclude the United States (or any other country) from enforcing a policy of refusing to accept service via its embassies. We have previously recognized that "[w]ere the United States to adopt exceptions to the inviolability

of foreign missions here, it would be stripped of its most powerful defense, that is, that international law precludes the nonconsensual entry of its missions abroad." *767 Third Ave. Assocs. v. Permanent Mission of Republic of Zaire to United Nations,* 988 F.2d 295, 300-01 (2d Cir. 1993). The United States may continue to instruct its embassies to follow this protocol, and so may any other country with a foreign diplomatic embassy. Nothing about our decision affects the ability of any state to refuse to accept service via its embassies.

Here, Sudan did not elect to follow any such policy. It did not reject the service papers, as it could have done easily, but accepted them. In these circumstances, where plaintiffs mailed the documents addressed to the Sudanese Minister of Foreign Affairs via the embassy, and the embassy explicitly acknowledged receipt of the documents, the requirements of the statute were met.

Significantly, the Vienna Convention provides that a mission may "consent" to entry onto its premises. Section 1 of Article 22 of the Convention provides that: "The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the *consent* of the head of the mission." Vienna Convention, art. 22 (emphasis added). Here, the Sudanese Embassy's acceptance of the service package surely constituted "consent." Instead of rejecting the service papers, Sudan accepted them and then, instead of returning them, it explicitly acknowledged receiving them. These actions, we conclude, constitute consent.

The Vienna Convention "recognized the independence and sovereignty of mission premises that existed under customary international law." *767 Third Ave. Assocs.*, 988 F.2d at 300. An important reason for the inviolability of the embassy premises is that the embassy is, to some degree, an extension of the sovereignty of the sending state. *See United States v. Gatlin*, 216 F.3d 207, 214 n.9 (2d Cir. 2000). To send officers into the embassy to serve papers would thus be akin to sending officers into the sovereign territory of the sending state itself. There is nothing offensive, however, about mailing a letter into the sovereign territory of a foreign state. Indeed, that is the very procedure that Sudan and the State Department urge is the preferred and required practice. We therefore find it difficult to understand how mailing a letter to the Foreign Minister of a country in care of that country's embassy in Washington -- particularly given that the embassy remains free to refuse delivery if it so chooses -- can be considered a grave insult to the "independence and sovereignty" of the embassy's premises.

Indeed, the embassy is extended somewhat less sovereignty than the actual territory of the sending state. *See McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 588 (9th Cir. 1983) ("A United States embassy, however, remains the territory of the receiving state, and does not constitute territory of the United States."); *see also* Jordan J. Paust, *Non-Extraterritoriality of 'Special Territorial Jurisdiction' of the United States: Forgotten History and the Errors of Erdos*, 24 YALE J. INT'L L. 305, 312 (1999) ("[A] U.S. embassy in foreign state territory is not U.S. territory and is not within the territorial

jurisdiction of the United States, any more than a foreign embassy within the United States is foreign territory or within the territorial jurisdiction of a foreign state."). While the precise degree to which the sovereignty of the embassy is less than a state's control over its own territory is subject to debate, it is evident that an embassy is not *more* sovereign than the territory of the sending state itself.

It is with some reluctance that we diverge from the Executive Branch's interpretation of the Vienna Convention, and of the potential effect of the Convention on the interpretation of the FSIA. It is appropriate to give the government's interpretation of the Vienna Convention "great weight" -- and we do -- but the State Department's views are "not conclusive." *Sumitomo Shoji Am., Inc. v. Avagliano,* 457 U.S. 176, 185 (1982). For the reasons stated above, we do not find those views persuasive.

III. **The Factual Argument**

In its reply in support of its petition for rehearing, Sudan argues that the evidence does not support a finding that the mailing was accepted by Sudan or delivered to the Sudanese Minister of Foreign Affairs. It argues that the signatures on the return receipt are illegible and it makes a factual argument that the package never reached the embassy.

Sudan's factual challenge to the service of process comes too late, for three independent reasons. First, Sudan raises the factual arguments for the first time on appeal. "[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." *In re Nortel Networks Corp. Sec. Litig.,* 539 F.3d 129, 132 (2d Cir. 2008)

(quoting *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006)).

Second, the factual challenge to service requires factfinding. "[F]actfinding is the basic responsibility of district courts, rather than appellate courts, and... the Court of Appeals should not . . . resolve[ ] in the first instance [a] factual dispute which ha[s] not been considered by the District Court." *DeMarco v. United States*, 415 U.S. 449, 450 n.* (1974). The factual challenge should have been raised during the five years that the case was pending in the district courts.

Third, even on appeal, Sudan did not raise the factual challenge until its reply brief in support of its petition for rehearing. It did not raise the issue in its briefing of the main appeal or in its initial submission on this petition for rehearing. *See Knipe v. Skinner*, 999 F.2d 708, 711 (2d Cir. 1993) ("Arguments may not be made for the first time in a reply brief.").

Accordingly, the factual challenge is not properly before us.

IV. The Requirement of an OFAC License

The United States also seeks to clarify the Panel Opinion with respect to when a license from OFAC is required. In the Panel Opinion, we held that the District Court did not err in issuing turnover orders without first obtaining either an OFAC license or a Statement of Interest from the Department of Justice. *See Harrison*, 802 F.3d at 406-07. This holding was based on the United States' position in previous Statements of Interest that § 201(a) of the Terrorism Risk Insurance Act ("TRIA"), Pub. L. No. 107-297, 116 Stat. 2322, 2337 (codified at 28 U.S.C.

§ 1610 note), permits a 28 U.S.C. § 1605A judgment holder to attach assets that have been blocked pursuant to certain economic sanctions laws without obtaining an OFAC license. The Panel Opinion included language, however, that may have suggested that § 1610(g) of the FSIA might permit a person holding a judgment under § 1605A to attach blocked assets without an OFAC license. *Harrison*, 802 F.3d at 407-08. This is not the case and thus we now clarify our ruling.

Section 1605 of the FSIA creates exceptions to the general blanket immunity of foreign states from the jurisdiction of U.S. courts, including the "terrorism exception," 28 U.S.C. § 1605A, which Congress added to the FSIA in 1996 to "give American Citizens an important economic and financial weapon against . . . outlaw states" that sponsor terrorism. H.R. Rep. No. 104-383, at 62 (1995). This exception allows courts to hear claims against foreign states designated by the State Department as "state sponsor[s] of terrorism." *See Calderon-Cardona v. Bank of N.Y. Mellon*, 770 F.3d 993, 996 (2d Cir. 2014).

The TRIA was enacted to aid victims of terrorism in satisfying judgments against foreign sponsors of terrorism. Section 201(a) of the TRIA, which governs post-judgment attachment in some terrorism cases, provides, in relevant part:

> *Notwithstanding any other provision of law...*, in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605A or 1605(a)(7) (as such

> section was in effect on January 27, 2008) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

TRIA § 201(a) (codified at 28 U.S.C. § 1610 note) (emphasis added).

Sudanese assets in the United States are subject to such a block, pursuant to sanctions that began with Executive Order 13067 in 1997 and are now administered by OFAC and codified at 31 C.F.R. Part 538. Ordinarily, unless a plaintiff obtains a license from OFAC, he is barred from attaching assets that are frozen under such sanctions regimes. The Panel Opinion held that, based on previous statements of interest made by the United States, blocked assets that are subject to the TRIA may be distributed without a license from OFAC. *Harrison,* 802 F.3d 408-09.

The Panel Opinion framed the issue, however, as "whether § 201(a) of the TRIA and *§ 1610(g) of the FSIA,* which authorize the execution of § 1605A judgments against state sponsors of terrorism, permit a § 1605A judgment holder to attach blocked Sudanese assets without a license from OFAC." *Id.* at 407-08.

The Panel Opinion should not have included the reference to § 1610(g) of the FSIA. Section 1610(g)(2)

of the FSIA, while providing that certain property "shall not be immune from attachment," does not contain the TRIA's same broad "notwithstanding any other provision of law" language. Therefore, it does not override other applicable requirements, such as the requirement of an OFAC license before the funds may be transferred. To be clear, when the TRIA does not apply and the funds at issue are attachable by operation of the FSIA alone, an OFAC license is still required.

In this case, plaintiffs obtained a terrorism judgment from the D.C. District Court pursuant to § 1605A of the FSIA. The Southern District of New York then issued three turnover orders. The first two orders specified that they were issued pursuant to 28 U.S.C. § 1610(g) but did not mention the TRIA. Only the third order specified that assets were "subject to turnover pursuant to § 201 of the Terrorism Risk Insurance Act of 2002." Joint App. at 76. While the district court did not explicitly discuss whether the funds at issue in the December 12 and 13, 2013 orders were subject to turnover pursuant to the TRIA, based on our review of the record, which includes the complaint and judgment in the D.C. District Court proceedings, and the turnover petition and orders in the proceedings below, we conclude that the funds were subject to turnover pursuant to the TRIA. Plaintiffs have "obtained a judgment against a terrorist party on a claim based upon an act of terrorism," the blocked assets are the assets of that terrorist party, and, accordingly, those assets "shall be subject to execution or attachment in aid of execution in order to satisfy [plaintiffs'] judgment to the extent of any compensatory damages for which

such terrorist party has been adjudged liable." *See* TRIA § 201(a) (codified at 28 U.S.C. § 1610 note). Because the funds at issue in all three turnover orders were subject to turnover pursuant to the TRIA, plaintiffs were not required to obtain an OFAC license before seeking distribution.

CONCLUSION

For the foregoing reasons, the petition, to the extent it seeks panel rehearing, is **DENIED**.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed: 12/09/2016]

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of December, two thousand sixteen.

Rick Harrison, John Buckley, III, Margaret Lopez, Andy Lopez, Keith Lorensen, Lisa Lorensen, Edward Love, Robert McTureous, David Morales, Gina Morris, Martin Songer, Jr., Shelly Songer, Jeremy Stewart, Kesha Stidham, Aaron Toney, Eric Williams, Carl Wingate, Tracey Smith, as personal representative of the Estate of Rubin Smith,

Plaintiffs-Appellees,

v.

Republic of Sudan,

Defendant-Appellant,

Advanced Chemical Works, AKA Advanced Commercial and Chemical Works Company Limited, AKA Advanced Training and Chemical Works Company Limited, Accounts & Electronics Equipments, AKA Accounts and Electronics Equipments, et al.,

Defendants,

National Bank of Egypt, Credit Agricole Corporate and Investment Bank,

Respondents.

ORDER
Docket No.: 14-121

Appellants Republic of Sudan, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

For The Court:

/s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe,
Clerk of Court

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed: 09/23/2015]

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of September, two thousand and fifteen.

Before:

Gerard E. Lynch, Denny Chin, *Circuit Judges,*

Edward R. Korman, *District Judge.**

Rick Harrison, John Buckley, III, Margaret Lopez, Andy Lopez, Keith Lorensen, Lisa Lorensen, Edward Love, Robert McTureous, David Morales, Gina Morris, Martin Songer, Jr., Shelly Songer, Jeremy Stewart, Kesha Stidham, Aaron Toney, Eric Williams, Carl Wingate, Tracey Smith, as personal representative of the Estate of Rubin Smith,

Plaintiffs-Appellees,

v.

Republic of Sudan,

Defendant-Appellant,

---

* The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

MANDATE ISSUED ON 12/22/2016

Advanced Chemical Works, AKA Advanced Commercial and Chemical Works Company Limited, AKA Advanced Training and Chemical Works Company Limited, Accounts & Electronics Equipments, AKA Accounts and Electronics Equipments, et al.,

Defendants,

National Bank of Egypt, Credit Agricole Corporate and Investment Bank,

Respondents.

ORDER

Docket No. 14-121

The appeal in the above captioned case from three orders of the United States District Court for the Southern District of New York was argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the orders of the district court are AFFIRMED.

For The Court:

/s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe,
Clerk of Court

No. 16-1094

IN THE

Supreme Court of the United States

REPUBLIC OF SUDAN,

Petitioner,

v.

RICK HARRISON, *et al.*,

Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether plaintiffs suing a foreign state under the Foreign Sovereign Immunities Act may serve process upon the head of the ministry of foreign affairs under 28 U.S.C. §1608(a)(3) by a mailing "through," "via," or "care of" the foreign state's diplomatic mission in Washington, D.C.

PARTIES TO THE PROCEEDING

The Republic of the Sudan, petitioner on review, was the defendant-appellant below.

The following individuals, respondents on review, were the plaintiffs-appellees below: Rick Harrison, John Buckley III, Margaret Lopez, Andy Lopez, Keith Lorensen, Lisa Lorensen, Edward Love, Robert McTureous, David Morales, Gina Morris, Martin Songer Jr., Shelly Songer, Jeremy Stewart, Kesha Stidham, Aaron Toney, Eric Williams, Carl Wingate, and Tracey Smith as personal representative of the Estate of Rubin Smith.

Mashreqbank, BNP Paribas, National Bank of Egypt, and Crédit Agricole Corporate and Investment Bank, respondents on review, were respondents below.

A list of additional parties to this proceeding is set forth in the Addendum to this Brief. Pursuant to Rule 12.6 of this Court, Sudan states that it does not believe that these additional parties have an interest in the outcome of this case.

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BRIEF FOR PETITIONER

Petitioner the Republic of the Sudan, a "foreign state" within the meaning of 28 U.S.C. §1603(a), respectfully requests that this Court reverse the judgment of the U.S. Court of Appeals for the Second Circuit and hold that the March 30, 2012 default judgment against Sudan is void for lack of personal jurisdiction under 28 U.S.C. §1330(b) due to improper service of process.

OPINIONS BELOW

The opinion of the Second Circuit (JA168-179) is reported at 802 F.3d 399. The Second Circuit's denial of panel rehearing (JA207-230) is reported at 838 F.3d 86. The Second Circuit's denial of rehearing en banc is unreported but reproduced at JA231-232.

The turnover orders entered by the U.S. District Court for the Southern District of New York are unreported but reproduced at JA149-164.

The opinion supporting the default judgment entered against Sudan by the U.S. District Court for the District of Columbia (JA84-139) is reported at 882 F. Supp. 2d 23. The default judgment is reproduced at JA81-83.

JURISDICTION

The Second Circuit entered judgment on September 23, 2015. Sudan's timely petition for panel rehearing was denied on September 22, 2016. Sudan's timely petition for rehearing en banc was denied on December 9, 2016. Sudan timely petitioned this Court for a writ of certiorari on March 9, 2017.

See 28 U.S.C. §2101(c); Sup. Ct. R. 13.1, 13.3. This Court granted Sudan's petition on June 25, 2018.

This Court has jurisdiction to review the Second Circuit's decision under 28 U.S.C. §1254(1).

PROVISIONS INVOLVED

The relevant provisions of the U.S. Code and of the Vienna Convention on Diplomatic Relations are set forth in the Addendum to this Brief.

INTRODUCTION

This case concerns the requirements for valid service of process upon a foreign state under the U.S. Foreign Sovereign Immunities Act ("FSIA"). Specifically, this case concerns a particular subsection of the FSIA, 28 U.S.C. §1608(a)(3), which in certain circumstances authorizes service of process on a foreign state "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." Here, the Second Circuit held that §1608(a)(3) is satisfied by a mailing that names the minister of foreign affairs as the recipient but that is sent to the address of the foreign state's embassy in Washington, D.C., rather than to the address of the ministry of foreign affairs in the foreign state's capital. The Second Circuit's holding, which departs from the holdings of other courts of appeals, is contrary to the intent of Congress in enacting §1608(a)(3).

First and foremost, the natural reading of §1608(a)(3) is that process must be mailed to the official office of the head of the ministry of foreign

affairs in the foreign state's capital. The operative statutory language, requiring that the mailing be "addressed and dispatched . . . to the head of the ministry of foreign affairs of the foreign state concerned," is naturally understood to require that the mailing be sent to the address of the head of the ministry in the foreign state without going through an intermediary such as the foreign state's embassy in Washington, D.C. Other statutory language reinforces this natural reading; for example, §1608(a)(3)'s requirement of a "form of mail requiring a signed receipt" supports the natural reading, because a signed receipt from an intermediary does not confirm delivery to the ultimate intended recipient, the head of the ministry of foreign affairs.

Furthermore, the Vienna Convention on Diplomatic Relations, which entered into force with respect to the United States on December 13, 1972, has long been understood to prohibit service upon *or through* a diplomatic mission. *See* Vienna Convention on Diplomatic Relations, art. 22(1), opened for signature Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 [hereinafter Vienna Convention] (providing that "[t]he premises of the mission shall be inviolable"). The Convention constitutes U.S. law in its own right, and also creates obligations on the part of the United States toward its treaty partners such as Sudan. As such, the FSIA should be interpreted as consistent with the Convention.

The FSIA's legislative history makes clear that Congress purposefully undertook to craft §1608(a)(3) to comport with the Vienna Convention and specifically with its prohibition on service upon or

through a diplomatic mission. Indeed, Congress modified an early draft of the service provisions to *exclude* a mailing to the ambassador or chief of mission of the foreign state precisely to ensure that the provisions comported with the Convention in this respect.

Since the enactment of the FSIA, the United States, mindful of its international treaty obligations and hopeful to avoid diplomatic friction and reciprocal treatment abroad, has consistently expressed the view that §1608(a)(3) does not authorize service upon or through the diplomatic missions of foreign states. The United States has expressed that position repeatedly in this case, including to this Court.

In the ruling under review here, the Second Circuit acknowledged that §1608(a)(3) does not authorize service *upon* a foreign state's diplomatic mission, such as Sudan's Embassy in Washington. But the Second Circuit accepted Plaintiffs' argument that they had not served process *upon* the mission, but rather had served Sudan (or the head of its ministry of foreign affairs) "via" or "care of" the Embassy. This distinction is specious; simply naming the head of Sudan's Ministry of Foreign Affairs as the recipient does not transform a mailing "addressed and dispatched" to Sudan's Embassy into one "addressed and dispatched" to him. Such a tactic cannot defeat the intention of Congress to preclude service upon — or through — a foreign state's diplomatic mission.

STATEMENT OF THE CASE

On October 12, 2000, terrorists bombed the U.S.S. *Cole* as it was refueling in the Port of Aden, Yemen, killing seventeen U.S. sailors and injuring at least forty others. The terrorist organization al Qaeda and its leader Osama Bin Laden claimed responsibility for the heinous attack.

Nearly a decade later, on October 4, 2010, fifteen of the injured sailors and three of their spouses brought suit in the U.S. District Court for the District of Columbia under the FSIA's terrorism exception, 28 U.S.C. §1605A, seeking to hold Sudan liable for their injuries resulting from the bombing. Plaintiffs alleged that al Qaeda carried out the attack, but that Sudan had provided al Qaeda and Bin Laden with "material support" that purportedly caused the attack.

Sudan, a sovereign nation in northeastern Africa, has been riven with civil war, natural disasters, and humanitarian crises for decades. The long-running Sudanese civil war resulted in the cession of southern Sudan to the new independent nation of South Sudan in 2011. Relations between Sudan and the United States have been strained at times, with Sudan being subject to various U.S. sanctions over the years. But Sudan and the United States have maintained diplomatic relations throughout. In recent years, relations between the two countries have warmed, and the United States has ended nearly all economic sanctions programs targeting Sudan. Sanctions Action Pursuant to Executive Order 13067 and Executive Order 13412, 82 Fed. Reg. 49,698 (Oct. 26, 2017). Although Sudan remains designated by the

United States as a state sponsor of terrorism, Sudan continues to work closely with the United States "on addressing regional conflicts and the threat of terrorism." Press Release, U.S. Dep't of State, Sanctions Revoked Following Sustained Positive Action by the Gov't of Sudan (Oct. 6, 2017).

Sudan acknowledges that Bin Laden resided in Sudan as a private citizen in the mid-1990s, until Sudan permanently expelled him in 1996. But Sudan vehemently denies the allegations that it provided "material support" to Bin Laden or al Qaeda or caused the attack on the *Cole*. Furthermore, Bin Laden was not yet an infamous terrorist while he resided in Sudan; Bin Laden was not designated as a terrorist by the United States until 1998 and al Qaeda was not designated by the United States as a terrorist organization until 1999. *See* Prohibiting Transactions With Terrorists Who Threaten To Disrupt the Middle East Peace Process, Exec. Order No. 13099, 63 Fed. Reg. 45,167 (Aug. 20, 1998) (designating, for the first time, Bin Laden as a terrorist who threatens to disrupt the Middle East peace process); Designation of Foreign Terrorist Organizations, 64 Fed. Reg. 55,112 (Oct. 8, 1999) (designating, for the first time, al Qaeda as foreign terrorist organization). Sudan maintains that it should be given the opportunity to defend itself against the serious, but baseless, allegations that underlie this action.

I. District Court Proceedings (D.D.C.)

To effect service of process on Sudan, on November 5, 2010, Plaintiffs filed an "Affidavit Requesting Foreign Mailing" asking the Clerk of the

D.C. District Court to mail process (i.e., a summons, complaint, and notice of suit) pursuant to 28 U.S.C. §1608(a)(3). JA69-70.

On November 17, 2010, the Clerk sent the service package via certified mail, return receipt requested, to the address specified in Plaintiffs' Affidavit:

> Republic of Sudan
> Deng Alor Koul
> Minister of Foreign Affairs
> Embassy of the Republic of Sudan
> 2210 Massachusetts Avenue NW
> Washington, DC 20008

JA69, 73-74; *see also* JA71-72 (Certificate of Mailing).

The record does not show that the service package was ever delivered to the Sudanese Embassy. JA75 (showing the package was delivered not to the Sudanese Embassy in Washington, but, curiously, to "Charlotte Hall, Maryland" on November 18, 2010). The record also does not show that the package was ever forwarded to the head of the Ministry of Foreign Affairs in Khartoum, Sudan's capital. Mr. Deng Alor Kuol was not, in fact, the Minister of Foreign Affairs of Sudan at the time the package was sent. *See* U.N. Protocol & Liaison Serv., *Heads of State, Heads of Government, Ministers for Foreign Affairs*, at 55 (Sept. 22, 2012) (identifying Mr. Ali Ahmed Karti as Sudan's Minister of Foreign Affairs and identifying Mr. Karti's "Date of Appointment" as June 16, 2010).

A return receipt, containing an illegible signature, was returned to the Clerk on November 23, 2010. JA74. The return receipt did not contain the printed

name of the signatory, or an indication of the date of delivery. *Id.* Plaintiffs made no attempt to serve Sudan (or the head of Sudan's Ministry of Foreign Affairs) by any mailing to Khartoum.

Sudan did not appear in the action, Plaintiffs moved for entry of default on January 18, 2011, and the Clerk entered a default against Sudan on January 19, 2011. JA80. On March 30, 2012, following a hearing, the D.C. District Court entered a default judgment against Sudan, finding jurisdiction and liability and awarding compensatory and punitive damages in the amount of $314,705,896. JA81-85.

In an attempt to comply with 28 U.S.C. §1608(e)'s requirement that any default judgment against a foreign state be served upon the foreign-state defendant, Plaintiffs on April 19, 2012, filed another Affidavit Requesting Foreign Mailing to effectuate service of the default judgment upon Sudan, in accordance with §1608(a)(3). JA140-141. Again, the package named Mr. Deng Alor Kuol as the recipient, but was sent by return-receipt mail to Sudan's Embassy in Washington, D.C. JA173.

II. District Court Proceedings (S.D.N.Y.)

Plaintiffs registered the default judgment in the U.S. District Court for the Southern District of New York in order to execute upon the default judgment in that court's jurisdiction. JA173. Plaintiffs petitioned for turnover of assets from respondent banks, which were holding funds blocked pursuant to the then-effective Sudanese Sanctions Regulations (31 C.F.R. Part 538). JA173. The S.D.N.Y. District Court

granted several of the petitions, issuing turnover orders on December 12, 2013, December 13, 2013, and January 6, 2014, in partial satisfaction of the default judgment. JA149-164.

Sudan appeared in the enforcement action, and, on January 13, 2014, timely appealed all three turnover orders. JA165-167.

While the appeal was pending, on June 14, 2015, Sudan moved in the D.C. District Court to vacate the default judgment under Rule 60(b) of Federal Rules of Civil Procedure, for, among other reasons, lack of personal jurisdiction owing to a failure to serve process in accordance with §1608(a)(3). *See* JA172-173 n.2. Sudan also moved to stay the appeal in the Second Circuit until the D.C. District Court ruled on the motion to vacate. *Id.* The Second Circuit denied a stay, and the motion to vacate in the D.C. District Court remains pending.

III. Second Circuit Appeal

On appeal of the turnover orders, Sudan's principal argument was that the default judgment was invalid because Sudan had not been served with process in the D.C. District Court action in accordance with §1608(a)(3), and the S.D.N.Y. District Court thus lacked any basis to grant the turnover petitions.

On September 23, 2015, the Second Circuit affirmed the S.D.N.Y. District Court's turnover orders, concluding that "[n]othing in §1608(a)(3) requires that the papers be mailed to a location in the foreign state, and the method chosen by plaintiffs —

a mailing addressed to the minister of foreign affairs at the embassy — was consistent with the language of the statute and could reasonably be expected to result in delivery to the intended person." JA179. The Second Circuit recognized that service on a diplomatic mission, such as the Sudanese Embassy, was prohibited by §1608(a)(3) and the Vienna Convention, but found that prohibition inapplicable: "In this case, service was directed to the right individual, using the Sudanese Embassy address for transmittal. Process was not served on the foreign mission; rather, process was served on the Minister of Foreign Affairs via the foreign mission." JA182.

IV. Petition For Rehearing

On October 7, 2015, Sudan petitioned for rehearing or rehearing en banc, and, on November 6, 2015, the United States submitted a brief as amicus curiae in support of Sudan's petition.

The United States argued that the Second Circuit's holding "runs contrary to the FSIA's text and history, and is inconsistent with the United States' international treaty obligations and international practice." JA198. The United States argued that the plain text of §1608(a)(3) requires a mailing to the foreign state's capital: "The most natural understanding of that text is that the mail will be sent to the head of the ministry of foreign affairs at his or her regular place of work — *i.e.*, at the ministry of foreign affairs in the state's seat of government — not to some other location for forwarding." JA199. The United States added that, under the Vienna Convention, "the premises of the [diplomatic] mission shall be inviolable," and that

"[t]he intrusion on a foreign embassy is present whether it is the ultimate recipient or merely the conduit of a summons and complaint." JA202-203 (citing Vienna Convention, art. 22). The United States also warned of "strong reciprocity interests at stake," because it rejects any attempt at service made upon the United States abroad "through an embassy." JA203-204.

On March 11, 2016, the Second Circuit panel held oral argument on the petition for rehearing, and counsel for Sudan and the United States each advocated for rehearing, while counsel for plaintiffs argued otherwise. JA207.

In an opinion dated September 22, 2016, the panel denied rehearing. In doing so, the panel stated: "We acknowledge that the statutory interpretation question presents a close call, and that the language of §1608(a)(3) is not completely clear." JA213. The panel added: "On its face, the statute does not specify a location where the papers are to be sent; it specifies only that the papers are to be addressed and dispatched to the head of the ministry of foreign affairs." JA213. The panel found "unpersuasive" the argument of the United States (and Sudan) that §1608(a)(3) is most naturally read as requiring that the service package be sent to the head of the ministry at his or her regular place of work, i.e., the ministry in the foreign state's capital. JA215. The panel also reiterated its view that its holding was not inconsistent with the prohibitions of §1608(a)(3) and the Vienna Convention against service "on" a diplomatic mission: "There is a significant difference between *serving process* on an embassy, and mailing

papers to a country's foreign ministry *via* the embassy." JA216 (emphasis in original); JA222. The panel expressed "some reluctance" over diverging from the Executive Branch's interpretation of the Vienna Convention. JA225.

In its opinion denying rehearing, the panel also held for the first time that the purported acceptance by the Sudanese Embassy of Plaintiffs' service package constituted "consent" to entry onto its premises within the meaning of Article 22(1) of the Vienna Convention on Diplomatic Relations. JA223. To reach this conclusion, the panel made a new factual finding, that "[i]nstead of rejecting the service papers, Sudan accepted them and then, instead of returning them, it explicitly acknowledged receiving them." *Id.* Sudan sought leave to file a Supplemental Petition in support of its pending Petition for Rehearing En Banc, arguing that the panel's new finding constructively amended the panel's underlying Opinion. JA62-63. The panel denied that request. JA63-64.

On December 9, 2016, the Second Circuit issued an order denying rehearing en banc. JA231-232.

SUMMARY OF ARGUMENT

I. The natural reading of 28 U.S.C. §1608(a)(3), by its terms and in the context of the FSIA as a whole, is that it requires the service package to be mailed to the head of the ministry of foreign affairs at his or her official office in the foreign state's capital. By requiring the package to be "addressed and dispatched . . . to" the head of the ministry, §1608(a)(3) is naturally read to require the package

to be sent to the address of the head of the ministry and not to some supposed agent or other intermediary, such as a diplomatic mission. Other provisions of §1608 expressly permit deliveries to agents or intermediaries in specified circumstances, so the omission of such permission in §1608(a)(3) is conspicuous and must be taken as purposeful. The Executive Branch and the courts have generally understood §1608(a)(3) to require mailing to the head of the ministry in the foreign state's capital, and to foreclose mailing of the service package to the foreign state's diplomatic mission in Washington, D.C.

II. Article 22 of the Vienna Convention reinforces the natural reading of §1608(a)(3) and, indeed, provides an independent basis for precluding service on, "through," "via," or "care of" a diplomatic mission. The United States and Sudan are both signatories to the Vienna Convention, which is self-executing and has been implemented by Congress (and even extended by Congress to protect the diplomatic missions of non-signatories). The United States agrees that §1608(a)(3) and Article 22 of the Vienna Convention do not permit service by mail on or through a diplomatic mission. These views of the United States are entitled to great weight and substantial deference. *See Abbott v. Abbott*, 560 U.S. 1, 15 (2010) (recognizing the "well-established canon of deference" that the "Executive Branch's interpretation of a treaty is entitled to great weight" (internal quotation marks omitted)); *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982) (requiring deference to treaty interpretation by treaty parties "absent extraordinarily strong contrary evidence").

The inviolability provisions of Article 22 constitute bedrock principles of international diplomacy, are enshrined in international law and practice, and are widely accepted in the United States and beyond as prohibiting service by mail on or through a diplomatic mission. *See, e.g., 767 Third Ave. Assocs. v. Perm. Mission of Zaire to the U.N.*, 988 F.2d 295, 299-300 (2d Cir. 1993) (tracing history of inviolability principle under international law and Article 22 of the Vienna Convention); *Kumar v. Republic of Sudan*, 880 F.3d 144 (4th Cir. 2018) (holding that Vienna Convention's inviolability provision prohibits application of §1608(a)(3) in a manner that would allow "service delivered to the foreign nation's embassy in the United States").

III. While resort to the legislative history of §1608(a)(3) is not necessary, it confirms Congressional intent to preclude service on or through a diplomatic mission. The history shows that an early version of the FSIA included mailing to an ambassador (or other head of mission) as part of one service method. But that version was changed out of concern that it would violate the Vienna Convention. Section 1608(a)(3), as enacted, was intended by Congress to conform to the protections afforded diplomatic missions under Article 22 of the Vienna Convention. The United States agrees that the legislative history reflects the unmistakable intent of Congress to prevent service on or through a foreign state's diplomatic mission.

IV. The views of the United States on §1608(a)(3) and the Vienna Convention are particularly significant because important principles of

international comity and reciprocity are at stake: an interpretation of the FSIA that places the United States in violation of its treaty obligations under the Vienna Convention would be an affront to other nations and would create friction in the Executive Branch's conduct of foreign relations. Moreover, the United States, which is sued frequently in courts around the world, routinely disavows the validity of service upon its own foreign missions. Placing the United States in violation of its treaty obligations on this point would deprive the United States of an important defense that service on its own foreign missions violates international law.

* * *

The Second Circuit acknowledged that the Vienna Convention prohibits service on a diplomatic mission, and that §1608(a)(3) was intended to comport with the Vienna Convention. Nevertheless, the Second Circuit endorsed Plaintiffs' facile circumvention of the prohibition. By permitting service by mail to a diplomatic mission simply because the mailing identifies the minister of foreign affairs as the recipient, the Second Circuit opinion conflicts with the strict requirements of §1608(a)(3) and with Article 22 of the Vienna Convention. The Second Circuit failed to appreciate that service of process is a formal and coercive assertion of sovereignty, and that service of process delivered to a diplomatic mission is a serious infringement upon the sovereignty and independence of the foreign state.

ARGUMENT

In 1976, Congress enacted the FSIA, which codifies "a doctrine that by and large continues to reflect basic principles of international law, in particular those principles embodied in what jurists refer to as the 'restrictive' theory of sovereign immunity." *Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1320 (2017); *see* Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. §§1330, 1391(f), 1441(d), and 1602-1611 (2012 & 2018 Supp.)) ("An Act to define the jurisdiction of United States courts in suits against foreign states . . . ."). The Department of State assisted in drafting the FSIA and advised Congress that the FSIA was drafted in line with the current state of international law to "diminish the likelihood that other nations would each go their own way, thereby 'subject[ing]' the United States 'abroad' to more claims 'than we permit in this country.'" *Helmerich*, 137 S. Ct. at 1320 (alteration in original).

This Court has held repeatedly that the FSIA provides "the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989); *see also Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993); *Samantar v. Yousuf*, 560 U.S. 305, 314 (2010). Through 28 U.S.C. §1604, the FSIA presumes that a foreign state enjoys immunity from subject-matter jurisdiction in federal and state courts in the United States, subject to specified exceptions. *See Helmerich*, 137 S. Ct. at

1319-20 ("[T]he FSIA starts from a premise of immunity and then creates exceptions to the general principle." (internal quotation marks omitted)); *see also* 28 U.S.C. §1330(a) (providing that the district courts shall have original jurisdiction over civil actions against a foreign state "with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement").

To obtain personal jurisdiction over a foreign state, an exception to immunity must apply and service of process must be made under 28 U.S.C. §1608(a). *See* 28 U.S.C. §1330(b). Section 1608(a) prescribes the exclusive methods for serving a foreign state (or a political subdivision of a foreign state) in U.S. litigation. *See* 28 U.S.C. §1330(b) ("Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) *where service has been made under section 1608 of this title.*" (emphasis added)); 28 U.S.C. §1608(a) ("Service in the courts of the United States and of the States *shall* be made upon a foreign state or political subdivision of a foreign state [in accordance with enumerated methods]" (emphasis added)); Fed. R. Civ. P. 4(j)(1) ("A foreign state or its political subdivision, agency, or instrumentality *must* be served in accordance with 28 U.S.C. §1608" (emphasis added)); *see also Kumar v. Republic of Sudan*, 880 F.3d 144, 154 (4th Cir. 2018) (stating that §1608(a) provides "the exclusive and explicit means" for serving a foreign state); *Magness v. Russian Federation*, 247 F.3d 609, 615 (5th Cir. 2001) (stating that "§1608(a) sets forth the

exclusive procedures for service on a foreign state" (internal quotation marks omitted)).

The service provisions under §1608(a) are "hierarchical, such that a plaintiff must attempt the methods of service in the order they are laid out in the statute." *Magness*, 247 F.3d at 613; *see also Barot v. Embassy of Zambia*, 785 F.3d 26, 27 (D.C. Cir. 2015) ("The Act provides four methods of service in descending order of preference.").

First, service must be attempted on a foreign state pursuant to any "special arrangement for service between the plaintiff and the foreign state," typically one found in a contract. 28 U.S.C. §1608(a)(1); *see Bluth v. Islamic Republic of Iran*, 203 F. Supp. 3d 1, 18 (D.D.C. 2016) ("The first preference is for 'any special arrangement[s]' for service between the plaintiff and the foreign state (i.e. a contract provision)." (alteration in original)).

Second, if the parties lack a "special arrangement for service," then service must be attempted "in accordance with an applicable international convention on service of judicial documents." 28 U.S.C. §1608(a)(2). Applicable international conventions are those "to which the United States and the foreign state are parties." Restatement (Third) of the Foreign Relations Law of the United States §457 cmt. b (Am. Law Inst. 1987). (The United States is a party to three such conventions: the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163; the Inter-American Convention on Letters Rogatory, Jan. 30, 1975, S.

Treaty Doc. No. 98-27, 1438 U.N.T.S. 288; and the Additional Protocol to the Inter-American Convention on Letters Rogatory, May 8, 1979, 1438 U.N.T.S. 322.)

Third, if service cannot be made under the first two methods, then service must be attempted under the method at issue here: "[A]ny form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. §1608(a)(3).

Fourth and finally, if service cannot be achieved under §1608(a)(3) within 30 days, then service must be made through diplomatic channels, with the assistance of the U.S. Department of State. *Id.* §1608(a)(4); *see also* 22 C.F.R. §93.1 (describing the procedures for "[s]ervice through the diplomatic channel").

These provisions for serving a foreign state (or a political subdivision thereof), found within §1608(a), differ in certain material respects from the FSIA's provisions for serving an "agency or instrumentality" of a foreign state, found within §1608(b). Section 1608(b)'s first method, under §1608(b)(1), is similar to §1608(a)(1) in requiring service in accordance with "any special arrangement for service" between the plaintiff and the agency or instrumentality. The next method, under §1608(b)(2), requires service either in accordance with an "applicable international convention," like §1608(a)(2), or by delivery "to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States." And finally,

§1608(b)(3) differs from §1608(a)(3) by requiring service, "if reasonably calculated to give actual notice," by delivery according to one of three methods: as directed by an authority of the foreign state; by mail "to the agency or instrumentality to be served"; or as directed by the court consistent with the law of the place of service. Section 1608(b) does not provide for service upon an agency or instrumentality through diplomatic channels, and therefore lacks an analogue to §1608(a)(4).

Because §1608(b)(3) provides for some flexibility in the method of service, as long as the method is "reasonably calculated to give actual notice," courts have held that service under subsection (b) requires only "substantial compliance" with its terms, whereas §1608(a)(3), lacking any reference to actual notice, requires "strict compliance." *See, e.g., Kumar*, 880 F.3d at 154 (observing that "based on §1608(a)'s four precise methods for service of process and how that language contrasts with §1608(b), subsection (a) requires strict compliance"); *Magness*, 247 F.3d at 615-16 (holding that the service-of-process procedures "outlined in section 1608(a) can *only* be satisfied by strict compliance" and acknowledging §1608(b)'s "reference to actual notice is absent from section 1608(a)" (emphasis added)); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994) (holding that "section 1608(a) *mandates* service of the Ministry of Foreign Affairs" and recognizing that "section 1608(a) says nothing about actual notice" (emphasis added)).

Here, the parties do not dispute that service in conformity with the first two methods of §1608(a) was

not possible, because Plaintiffs have no "special arrangement for service" with Sudan, and because Sudan is not a party to any "international convention on service of judicial documents" to which the United States is a party. JA177; 28 U.S.C. §1608(a)(1)-(2). Accordingly, Plaintiffs were required to serve Sudan in "strict compliance" with the third method of service under §1608(a) — by sending process "by any form of mail requiring a signed receipt, to be *addressed and dispatched* . . . *to* the head of the ministry of foreign affairs of the foreign state." 28 U.S.C. §1608(a)(3) (emphasis added).

I. The Text Of §1608(a)(3) Is Naturally Read To Require That Process Be Mailed To The Head Of The Ministry Of Foreign Affairs In The Foreign State

Interpreting the provisions of the FSIA "starts 'where all such inquiries must begin: with the language of the statute itself.'" *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1759 (2018) (quoting *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011)). This Court recently instructed that interpretation of a provision of the FSIA first involves an examination of the "natural reading" of the provision at issue. *See Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 823, 826 (2018) (rejecting petitioners' "strained and unnatural reading" of a phrase in 28 U.S.C. §1610(g)). The natural reading of the statutory text considers the pertinent text of the statute in the context of its overall statutory scheme. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 44 (2008) ("It is a fundamental canon of statutory construction that the words of a

statute must be read in their context and with a view to their place in the overall statutory scheme." (quoting *Davis v. Mich. Dep't of Treas.*, 489 U.S. 803, 809 (1989))); *Samantar*, 560 U.S. at 319 (interpreting the FSIA: "We do not construe statutory phrases in isolation; we read statutes as a whole.").

Section 1608(a)(3) requires service of process "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." The natural reading of this statutory text is that process must be sent to the address of the head of the ministry of foreign affairs in the foreign state. A mailing is not naturally understood to be "addressed and dispatched" to a specified person if it names the person as the recipient but is sent to an address other than the person's address. The statutory requirement of a signed receipt reinforces that §1608(a)(3) contemplates a mailing to the address of the head of the ministry; a signed receipt cannot verify delivery to the head of the ministry if the mailing is sent, not to the address of the head of the ministry, but to the address of an intermediary, where the intermediary signs the return receipt.

This natural reading is further confirmed by §1608(c)(2), which provides that "[s]ervice shall be deemed to have been made . . . as of the date of receipt indicated in the . . . signed and returned postal receipt . . . ." Deeming service to have been made as of the date of receipt indicated on the signed and returned postal receipt makes sense only if the service package is being delivered to the ministry of

foreign affairs at that time. This is the case, because the date on the signed receipt triggers the sixty-day response period under §1608(d). If §1608(a)(3) contemplated, or permitted, sending the service package to an embassy or other intermediary for forwarding to the minister of foreign affairs, §1608 likely would have provided that service "shall be deemed to have been made" at the time of delivery to the minister (or perhaps that some extra time would be added to the sixty-day response period to account for the time needed for forwarding).

Notably, §1608(a)(4) permits a plaintiff to accomplish service through a mailing to the U.S. Department of State for transmittal by diplomatic channels, but, under §1608(c)(1), that service is not deemed to have been made until the service package is transmitted to the foreign state. This scenario confirms both that Congress specified intermediaries when it intended to authorize their use, and that Congress did not intend the sixty-day response time to run until the service package was delivered to the intended recipient.

Further support for the natural reading of §1608(a)(3) is found in §1608(b)(2) and (3). As discussed, §1608(b)(2) permits service upon agencies or instrumentalities of a foreign state by delivery to specified persons ("an officer" or "a managing or general agent") but also to "any other agent authorized by appointment or by law to receive service of process in the United States." And §1608(b)(3) permits service to be delivered by various other methods "if reasonably calculated to give actual notice." The flexibility expressly permitted under

§1608(b)(2) and (3), and the absence of corresponding flexibility under §1608(a)(3), strongly suggests that Congress intended for §1608(a)(3) to be followed meticulously and without derivation. *See Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) (comparing subsections of a statutory section and finding the differences "significant because Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another").

At bottom, if Congress intended to allow a foreign state to be served by a mailing addressed and sent to a diplomatic mission in the United States, Congress could have easily expressed that intention — just as it expressed its intention to permit service through the State Department under §1608(a)(4), upon "agents" under §1608(b)(2), or by various alternative methods under §1608(b)(3). *See also* 28 U.S.C. §1605(b)(1) (providing for delivery of a summons and complaint "to the person, *or his agent*, having possession of the vessel or cargo" (emphasis added)). The natural reading of §1608(a)(3) is therefore that the service package must be sent to the address of the minister of foreign affairs in the foreign state; any alternative or indirect method of delivery is not authorized by §1608(a)(3).

The natural reading of §1608(a)(3) has prevailed ever since the enactment of the FSIA, including in "a message to all [U.S.] diplomatic and consular posts, sent May 15, 1979," in which the State Department wrote: "Paragraph (3) [of §1608(a)] provides for service by sending by registered mail, return receipt requested, the summons and complaint from the

court *directly to the ministry of foreign affairs* of the defendant foreign state." *Service of Process upon a Foreign State*, 1979 Dig. U.S. Prac. Int'l L. 894 (1979) (emphasis added) (text of State Department Circular).

The D.C. Circuit, the court of appeals that adjudicates an outsized share of FSIA cases, has long adhered to this natural reading as well. *See Transaero*, 30 F.3d at 153-54 (D.C. Cir. 1994). In *Transaero*, the D.C. Circuit vacated a default judgment as "void and unenforceable," despite the foreign state's actual notice of the action, because service under §1608(a)(3) had been mailed to the "Bolivian Ambassador and Consul General in Washington . . . but never the Ministry of Foreign Affairs or the Secretary of State." *Id.* at 153, 154. Consistent with the natural reading of §1608(a)(3), the *Transaero* court held that §1608(a)(3) "mandates service of the Ministry of Foreign Affairs, the department most likely to understand American procedure." *Id.* at 154.

The D.C. Circuit reaffirmed this natural reading in a suit against the Embassy of Zambia. *See Barot*, 785 F.3d at 28, 30 (D.C. Cir. 2015) (citing *Transaero*). As a political subdivision of the Republic of Zambia, the Zambian Embassy was subject to service only under §1608(a). *Id.* at 27. The D.C. Circuit, emphasizing that "strict adherence to the terms of 1608(a) is required," stated that one of the plaintiff's prior attempts at service was unsuccessful because it had been attempted "at the Embassy in Washington, D.C., rather than *at the Ministry of Foreign Affairs in Lusaka, Zambia, as the Act required*." *Id.* at 27, 28

(emphasis added) (quoting *Transaero*, 30 F.3d at 154). The appeals court ultimately directed that service be "sent to the head of the ministry of foreign affairs in Lusaka, Zambia." *Id.* at 30 (internal quotation marks omitted).

The Fifth Circuit also has followed the natural reading of §1608(a)(3), holding that service on the Russian Federation and Ministry of Culture under this provision required service on the head of the Russian Ministry of Foreign Affairs, "through the Ministry of Foreign Affairs," and not through any intermediary. *Magness*, 247 F.3d at 613 (5th Cir. 2001). The Fifth Circuit categorically rejected plaintiffs' attempt to serve the Russian Federation and its political subdivision by papers transmitted by the Texas Secretary of State to Russia "c/o" (i.e. care of) Boris Yeltsin and to the Ministry of Culture "c/o" the Deputy Minister of Culture. *Id.* at 611.

The Fourth Circuit in *Kumar* recognized that the language "addressed and dispatched . . . to" in §1608(a)(3) "reinforce[s] that the location of service must be related to the intended recipient." 888 F.3d at 155. But the Fourth Circuit concluded that the text of §1608(a)(3) alone was insufficient to determine whether service on or through an embassy was compliant:

> The statute is simply ambiguous as to whether delivery at the foreign state's embassy meets subsection (a)(3) given that while the head of the ministry of foreign affairs generally oversees a foreign state's embassies, the foreign minister is rarely — if ever — present

> there. Serving the foreign minister at a location removed from where he or she actually works is at least in tension with Congress' objective, even if it is not strictly prohibited by the statutory language.

Id. While the Fourth Circuit's finding of ambiguity in §1608(a)(3) caused it to go beyond the statutory text and employ other tools for divining Congressional intent, the Fourth Circuit comfortably concluded that service "through," "via," or "care of" a diplomatic mission is prohibited under §1608(a)(3). *Id.* at 158.

The Second Circuit is the only court of appeals to diverge from these conclusions that process may not be served on a foreign state through its mission or other agent. The Second Circuit acknowledged that §1608(a)(3) requires process to be mailed to the head of the ministry of foreign affairs, but understood the provision to be "silent as to a specific location where the mailing is to be addressed." JA178. As this Court observed in interpreting the FSIA in *Samantar*, however, drawing inferences from silence is unwarranted when Congress expressly addressed the issue elsewhere in the FSIA. 560 U.S. at 317 ("Drawing meaning from silence is particularly inappropriate . . . [when] Congress has shown that it knows how to [address an issue] in express terms." (alterations and omission in original) (quoting *Kimbrough v. United States*, 552 U.S. 85, 103 (2007)).

Furthermore, the Second Circuit did not seem to consider that §1608(a)(3)'s requirement of a mailing "addressed and dispatched . . . to" the minister of foreign affairs is naturally read as requiring that the

mailing must be addressed and sent to the minister's official address in the foreign state. Nor did the Second Circuit seem to consider the other provisions of the FSIA supporting just such a reading.

The Second Circuit instead contrasted §1608(a)(3) with §1608(a)(4), which specifies that process be mailed "to the Secretary of State *in Washington, District of Columbia*." JA178 (emphasis in original); 28 U.S.C. §1608(a)(4). But that contrast is hardly informative, as the FSIA applies in state courts as well, and §1608(a)(4) appropriately specifies that service through diplomatic channels is always by the federal Secretary of State rather than a Secretary of State of an individual state. *See* 28 U.S.C. §1602 (stating that claims against foreign states are to "be decided by courts of the United States and of the States in conformity with" the FSIA).

Besides, under the Second Circuit's reasoning, §1608(a)(4)'s specification that the mailing should be to the Secretary of State "in Washington, District of Columbia" would leave open the possibility that the mailing could name the Secretary of State but be addressed and sent to an address in Washington other than the Department of State. But the natural reading of §1608(a)(4) is that the mailing must be addressed and sent to the Secretary of State at the State Department, just as the natural reading of §1608(a)(3) is that the mailing must be addressed and sent to the minister of foreign affairs at the ministry in the capital of the foreign state. If anything, the reference to Washington, D.C., in §1608(a)(4) only confirms that a §1608(a)(3) mailing, too, must be sent to the relevant capital city.

In denying rehearing, the Second Circuit acknowledged the amicus brief of the United States and the argument therein that §1608(a)(3) is most naturally read as requiring the mailing to be sent to the head of the ministry "at his or her regular place of work — *i.e.*, at the ministry of foreign affairs in the state's seat of government." JA215 (quoting U.S. amicus brief in support of rehearing at 2 (JA199)). The Second Circuit rejected this argument as "unpersuasive" on the grounds that it would require additional words being read into the statute. JA215. But, the Second Circuit's own interpretation read into the statute the use of intermediaries for service of process on a foreign state and, again, failed to consider the text of §1608(a)(3) — "addressed and dispatched . . . to" — and other relevant statutory provisions. The Second Circuit's interpretation also is inconsistent with the strict construction of §1608(a), under which means of service that are not expressly authorized are prohibited.

The Second Circuit, in denying rehearing, took the opportunity to clarify that it was not holding that the Sudanese Embassy was an agent or proxy for service upon the foreign state: "There is a significant difference between *serving process* on an embassy, and mailing papers to a country's foreign ministry *via* the embassy." JA216 (emphasis in original). The Second Circuit added: "[T]he papers were not served on the embassy as a proxy or agent for Sudan, but they were instead mailed to the Minster of Foreign Affairs, in the most natural way possible — addressed to him, by name, via Sudan's embassy." JA217.

While the Second Circuit disclaimed that process was being served "on" the Sudanese Embassy, the record suggests that the Plaintiffs and the D.C. District Court Clerk thought otherwise. Plaintiffs moved for entry of default immediately upon the expiration of the sixty-day deadline for Sudan to respond to the complaint, counting from the date of the supposed delivery to the Embassy. JA76. The Clerk promptly entered Sudan's default the next day. JA80.

In holding that "service on the foreign minister via the embassy was not inconsistent with the wording of the statute" (JA217), the Second Circuit seemed to appreciate that its reasoning could not be followed to its logical conclusion: "We do not suggest that service could be made on a minister of foreign affairs via other offices in the United States or another country maintained by the country in question, such as, *e.g.*, a consular office, the country's mission to the United Nations, or a tourism office." JA214 n.3. The statutory language, however, does not support using the embassy — but no other foreign-state office — as an intermediary.

In *Samantar*, this Court observed that the text of the FSIA "does not expressly foreclose" applicability of the statute to foreign officials, but that the FSIA considered as a whole — with its extensive treatment of foreign states, political subdivisions, agencies and instrumentalities but silence on foreign officials — established that the statute did not apply to foreign officials. 560 U.S. at 314-19. The same logic applies here. While §1608(a)(3) may not *expressly* foreclose service of process "through," "via," or "care of" a

diplomatic mission, the FSIA's service provisions considered as a whole — with their extensive treatment of detailed and specific service requirements, but silence on agents or intermediaries for service of process under §1608(a)(3) — decisively foreclose such service. *See also Kumar*, 888 F.3d at 159, n.11 (finding the Second Circuit's distinction between service "on" and service "via" an embassy an "artificial, non-textual distinction" that is "weak and unconvincing").

II. Permitting §1608(a)(3) Service "Through," "Via," Or "Care Of" A Diplomatic Mission Conflicts With The Vienna Convention, In Violation Of U.S. Law

The Second Circuit's reading of §1608(a)(3) is also unsupportable, because it directly conflicts with U.S. treaty obligations under the Vienna Convention, which is an independent and integral part of U.S. law.

The United States was a party to the Vienna Convention on Diplomatic Relations at the time of the enactment of the FSIA in 1976 and remains a party to this day. *See* 23 U.S.T. 2337; *Status of Vienna Convention on Diplomatic Relations*, U.N. Treaty Collection, https://perma.cc/XZ76-XDC5 (last updated Aug. 14, 2018). The Vienna Convention entered into force in the United States on December 13, 1972 (23 U.S.T. 3227), and forms part of U.S. law. U.S. Const., art. VI, cl. 2; *Tabion v. Mufti*, 73 F.3d 535, 536 n.1 (4th Cir. 1996) ("The Vienna Convention became applicable to the United States by the Diplomatic Relations Act, 22 U.S.C. §§251-59 . . . ."); *see also* Diplomatic Relations Act of 1978, Pub. L. No. 95-393,

92 Stat. 808 ("[e]stablish[ing] . . . the Vienna Convention as the United States Law on Diplomatic Privileges and Immunities" and extending "the privileges and immunities specified in the Vienna Convention" to "[m]embers of the mission of a sending state which has not ratified the Vienna Convention"); H.R. Rep. No. 95-526, at 2 (1977) ("Since the [Vienna] Convention is self-executing, no implementing legislation is needed."); 124 Cong. Rec. 26,718 (1978) (statement of Sen. Sarbanes) ("[The Diplomatic Relations Act] would codify the privileges and immunities provisions of the Vienna [C]onvention as the sole U.S. law on the subject."); Restatement (Fourth) on the Foreign Relations Law of the United States, §301 Reporters' note 6 (Am. Law Inst., Tentative Draft No. 2, 2016) (stating that the Vienna Convention on Diplomatic Relations is "self-executing, but Congress has additionally implemented [it] by statute").

As this Court has explained: "A treaty . . . by the express words of the Constitution, is the supreme law of the land, binding alike National and state courts, and is capable of enforcement, and must be enforced by them in the litigation of private rights." *Maiorano v. Baltimore & Ohio R.R. Co.*, 213 U.S. 268, 272-73 (1909); *see also Air France v. Saks*, 470 U.S. 392, 406 (1985) (applying the Convention for the Unification of Certain Rules Relating to International Transportation by Air and stating "[i]t remains '[our] duty . . . to enforce the . . . treaties of the United States, whatever they might be, and . . . [the] Convention remains the supreme law of the land'" (first three alterations in original) (quoting *Reed v. Wiser*, 555 F.2d 1079, 1093 (2d Cir. 1977))).

Therefore, separate and apart from the strict requirements of §1608(a)(3), the Second Circuit was required to reject a method of service of process that violated the terms of the Vienna Convention. *See Tabion*, 73 F.3d at 539 (affirming decision to quash service of process that violated diplomatic immunity provisions of the Vienna Convention); *767 Third Ave. Assocs. v. Perm. Mission of the Republic of Zaire to the U.N.*, 988 F.2d 295, 302 (2d Cir. 1993) (reversing eviction order because it violated Article 22 of the Vienna Convention); *see also* 71 Dep't of State Bull. 429, 458-59 (1974) (quoting Diplomatic Note of July 11, 1974, which advised foreign missions that "countries party to the Convention on Diplomatic Relations, signed at Vienna on April 18, 1961, would have a basis for objection to the propriety of process served" "through registered or certified mail to the ambassador or chief of mission" "under Article 22, section 1, of that Convention, as interpreted in light of the negotiating history of that Convention").

Moreover, basic principles of statutory interpretation call for consistency with relevant international law and agreements. *See Frost v. Wenie*, 157 U.S. 46, 60 (1895) (holding that "the intention of Congress can be ascertained only by a consideration of" a treaty and its related legislation "in pari materia" because "had Congress intended a repeal the effect of which would be to disregard treaty obligations, or to defeat or impair treaty rights, . . . it would have expressed that intention in plain words and not left it to implication"); *Roeder v. Islamic Republic of Iran*, 646 F.3d 56, 61 (D.C. Cir. 2011) ("Legislation abrogating international agreements must be clear to ensure that Congress — and the

President — have considered the consequences." (internal quotation marks and citation omitted)); Restatement (Third) of the Foreign Relations Law of the United States §114 (Am. Law Inst. 1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with . . . an international agreement of the United States."). Indeed, because one of the purposes of the FSIA was the "'codification of international law at the time of the FSIA's enactment,'" this Court has "examined the relevant common law and international practice when interpreting the Act." *Samantar*, 560 U.S. at 319-20 (quoting *Perm. Mission of India to the U.N. v. City of New York*, 551 U.S. 193, 199 (2007)); *see also Kumar*, 880 F.3d at 155 (finding that "the plain language of subsection (a)(3) does not fully resolve the issue before us" and thus analyzing §1608(a)(3) in light of U.S. treaty obligations as well as the FSIA's legislative history).

Furthermore, the text of the FSIA makes clear that the provisions of the Act should be read subject to existing international agreements: "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. §1604; *see also* H.R. Rep. No. 94-1487, at 17 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6625 ("In the event an international agreement expressly conflicts with this bill, the international agreement would control."). Thus, by the express terms of the FSIA, §1608(a)(3)

should be read subject to the immunity provisions of the Vienna Convention.

The Second Circuit's decision permitting §1608(a)(3) service of process "via" Sudan's Embassy in Washington, D.C., is irreconcilable with the Vienna Convention and for this independent reason should be reversed.

1.a. Article 22 of the Vienna Convention provides that "[t]he premises of the mission shall be inviolable." As an international law scholar has observed: "The principle of inviolability of diplomatic missions and their personnel is one of the oldest and universally accepted concepts in the relations between nations." Biswanath Sen, *A Diplomat's Handbook of International Law & Practice* 119 (3d ed. 1988). Indeed, the concept of inviolability dates to at least the Roman times: "whenever the priests of College of Fetiales conducted diplomatic negotiations, the Republic demanded and obtained respect for their inviolability; it also refrained, as a general rule, from any interference with the person or property of foreign ambassadors sent on special mission to Rome." U.N. International Law Commission Secretariat, Diplomatic Intercourse and Immunities, Memorandum Prepared by the Secretariat, ¶ 18, U.N. Doc. A/CN.4/98 (Feb. 21, 1956), *reprinted in* [1956] 2 Y.B. Int'l L. Comm'n 129, U.N. Doc. A/CN.4/SER.A/1956/Add.1 [hereinafter U.N. Secretariat Mem.]. And respect for the inviolability of mission premises "had become by the 18th century an established international practice." *767 Third Ave.*, 988 F.2d at 300.

The international consensus on the importance of inviolability

> stems from the fact that it is both necessary and in the common interest of the whole family of nations that Governments should maintain relations with each other through agents specially empowered for that purpose. These agents should, in the interests of their mission, enjoy full and unrestricted independence in the performance of their allotted duties. It follows, therefore, that their person, domicile, correspondence and subordinate staff should be inviolable.

U.N. Secretariat Mem. ¶ 313.

In 1954, the U.N. International Law Commission decided to "initiate work" on codifying the international legal consensus on "[d]iplomatic intercourse and immunities." U.N. Secretariat Mem. ¶ 1 (internal citation omitted). What would ultimately become the Vienna Convention — including its codification of the concept of mission inviolability and whether to provide for any exceptions — was intensely debated. *See, e.g.*, U.N. Conf. on Diplomatic Intercourse & Immunities, Summary Records of Plenary Meetings & Meetings of the Committee of the Whole, at 135-36, 138-39, U.N. Doc. A.CONF.20/14 (Vol. 1), U.N. Sales No. 61.X.2 (1962) (discussing exception to inviolability in cases of emergency) [hereinafter U.N. Conf. Summary Records]. Ultimately, the consensus was that there should be ***no*** exception to mission inviolability and

that "the receiving State is obliged to prevent its agents from entering the premises for *any official act whatsoever*." *767 Third Ave.*, 988 F.2d at 299 (emphasis added) (quoting *Report of the International Law Commission to the General Assembly*, 12 U.N. GAOR Supp. 9, at 6, U.N. Doc. A/3623 (1957), *reprinted in* [1957] 2 Y.B. Int'l L. Comm'n 131, at 137, U.N. Doc. A/CN.4/SER.A/1957/Add.1); *see also* U.N. Conf. Summary Records 136 ("[T]he inviolability of the mission premises was one of the most important principles of international law. . . . The International Law Commission had therefore been right in not providing for any exceptions, which would be contrary to international law, open the door to abuses and be fraught with serious consequences." (description of statements of Mr. Ivan Daskalov (Bulgaria))).

1.b. Both U.S. and international law recognize that, among the "official acts" prohibited by the inviolability principle, Article 22 prohibits service of process on a sovereign's embassy, consulate, and diplomatic officers, including service by mail. *See, e.g., Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 748 (7th Cir. 2007) (holding that "service through an embassy is expressly banned" by the Vienna Convention); *767 Third Ave.*, 988 F.2d at 301 (approvingly acknowledging view that "process servers may not even serve papers without entering at the door of a mission because that would 'constitute an infringement of the respect due to the mission'" (internal citation omitted)); Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 124 (4th ed. 2016) ("The view that service by post on mission

premises is prohibited seems to have become generally accepted in practice."); James Crawford, *Brownlie's Principles of Public International Law* 403 (8th ed. 2012) ("It follows from Article 22 that writs cannot be served, even by post, within the premises of a mission *but only through the local Ministry for Foreign Affairs*." (emphasis added)); Ludwik Dembinski, *The Modern Law of Diplomacy* 193 (1988) ("[Article 22] protects the mission from receiving by messenger or by mail any notification from the judicial or other authorities of the receiving State.").

As the United States has stated in this case: "The Executive Branch's interpretation also reflects the prevailing understanding of Article 22" that "service by post on mission premises is prohibited." Br. of the United States as Amicus Curiae, May 22, 2018 [hereinafter U.S. Br.], at 12-13 (quoting Denza, *supra*, at 124). The United States further explained that its view accords with the Convention's drafting history and the views of other countries that are party to the treaty. U.S. Br. 13; *see Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1509 (2017) (looking to treaty drafting and negotiating history to confirm understanding of treaty term). Indeed, in a report accompanying a preliminary draft of the Vienna Convention, the U.N. International Law Commission stated:

> [N]o writ shall be served within the premises of the mission, nor shall any summons to appear before a court be served in the premises by a process server. Even if process servers do not enter the premises but carry out their

> duty at the door, such an act would constitute an infringement of the respect due to the mission. All judicial notices of this nature must be delivered *through the Ministry for Foreign Affairs of the receiving State.*

Report of the International Law Commission to the General Assembly, 12 U.N. GAOR Supp. No. 9, at 6, U.N. Doc. A/3623 (1957), *reprinted in* [1957] 2 Y.B. Int'l L. Comm'n 131, at 137 U.N. Doc. A/CN.4/SER.A/1957/Add.1 (emphasis added). The negotiating history of the Vienna Convention also demonstrates "that it was the unanimous interpretation of the [Committee of the Whole] that no writ could be served, *even by post*, within the premises of a diplomatic mission." U.N. Conf. Summary Records at 141 (emphasis added) (description of statements of Mr. Michitoshi Takahashi (Japan)); *see also id.* at 137 (representative for Argentina stating that "his delegation was opposed to any exceptions to the principle of the inviolability of mission premises" and stating that his delegation would vote against a proposed amendment "if it were to be interpreted as permitting the service of a writ through the post" (description of statements of Mr. Carlos Maria Bollini Shaw (Argentina))).

Remarkably, in its opinion denying Sudan's petition for rehearing, the Second Circuit panel expressly acknowledged that service upon a foreign embassy or mission is prohibited by the Vienna Convention: "We acknowledge that these provisions preclude service of process on an embassy or diplomat

as an agent of a foreign government, as there would be a breach of diplomatic immunity if an envoy were subjected to compulsory process. Accordingly, service on an embassy or consular official would be improper." JA222 (citing Vienna Convention, arts. 22, 31). Plaintiffs themselves have also repeatedly conceded that §1608(a)(3) does not permit service on any embassy as the method is barred by the Vienna Convention. *See, e.g.*, Opp'n to Pet. for Writ. of Cert. 17, 19. Thus, it is undisputed that §1608(a)(3) precludes service upon a foreign state's embassy.

2. By nevertheless permitting §1608(a)(3) service "on [Sudan's] foreign minister *via* the embassy address" (JA182 (emphasis in original)), the Second Circuit endorsed a method for service of process on a foreign state that directly contravenes the principle of inviolability under the Vienna Convention and fails to give effect to the intention of the treaty parties. *Cf. Water Splash*, 137 S. Ct. at 1512 (recognizing the "importance of read[ing] the treaty in a manner consistent with the *shared* expectations of the contracting parties" (alteration and emphasis in original) (internal quotation marks and citation omitted)).

Relying on an artificial semantic distinction between service "on" and "via" an embassy, the Second Circuit understood there to be a difference between Plaintiffs' attempted service and the service prohibited by the Vienna Convention: "In a case where the suit is not against the embassy or diplomatic agent, but against the foreign state with service on the foreign minister *via* the embassy address, we do not see how principles of mission

inviolability and diplomatic immunity are implicated." JA182 (emphasis in original). Even after both Sudan and the United States emphasized that service "on" and "via" an embassy are one and the same and equally violate mission inviolability, the Second Circuit adhered to its purported distinction, stating:

> [S]ervice on an embassy or consular official would be improper. But that is not what happened here. Rather, process was served on the Minister of Foreign Affairs at the foreign mission and not on the foreign mission itself or the ambassador. The papers were specifically addressed to the Minister of Foreign Affairs via the embassy, and the embassy sent back a return receipt acknowledging receipt of the papers.

JA222. The Second Circuit cited no authority or support for its purported distinction, other than two cases from the U.S. District Court for the Eastern District of Virginia, which have since been overruled by the Fourth Circuit. JA218-219; *see Kumar*, 880 F.3d at 158 (declining to authorize service under §1608(a)(3) that names the foreign minister but is mailed to the foreign state's embassy). The Second Circuit instead based its reasoning on the fundamentally flawed premise that the Vienna Convention simply does not address the concept of service "via" an embassy. JA181-182.

As the United States has emphasized in its brief to this Court, the Second Circuit's distinction is "artificial" and "non-textual," as "in either case,

mailing service to the embassy treats [the embassy] as the state's 'de facto agent for service of process,' in violation of the [Vienna Convention]'s principle of mission inviolability." U.S. Br. 15 (quoting *Kumar*, 880 F.3d at 159 n.11). The views of the United States on this question of treaty interpretation are "entitled to great weight." *Abbott v. Abbott*, 560 U.S. 1, 15 (2010); *see also Water Splash*, 137 S. Ct. at 1512 (holding same). Likewise, the Fourth Circuit in *Kumar* held:

> The distinction . . . accepted by the Second Circuit in *Harrison*, rests on the artificial, non-textual distinction between service "on" the embassy and "via" the embassy. . . . [W]e find no such distinction for purposes of subsection (a)(3). In both cases, the embassy is the de facto agent for service of process, something the Vienna Convention does not allow absent a waiver of mission inviolability.

Kumar, 880 F.3d at 159 n.11.

In short, the Second Circuit's distinction without a difference is nothing but a "semantic ploy" to permit what is otherwise plainly prohibited by the Vienna Convention. *Cf. Saudi Arabia v. Nelson*, 507 U.S. 349, 363 (1993) (reasoning that "[t]o give jurisdictional significance to" a "semantic ploy . . . would effectively thwart the [FSIA]'s manifest purpose to codify" international law).

2.a. The Second Circuit found it "difficult to understand how mailing a letter to the Foreign

Minister of a country in care of that country's embassy in Washington . . . can be considered a grave insult to the 'independence and sovereignty' of the embassy's premises." JA224. But, notwithstanding the Second Circuit's dismissiveness, serving process by mail is not merely "mailing a letter," and Congress would not have carefully crafted the strict hierarchical procedures for service of process on a foreign sovereign under §1608(a) if it were. Rather, "[s]ervice of process refers to a formal delivery of documents that is legally sufficient to charge the defendant with notice of a pending action." *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988). As has been long recognized in international practice under the Vienna Convention (*see supra*), sending process into a mission may indeed be considered an infringement of sovereignty. *E.g.*, *767 Third Ave.*, 988 F.2d at 301 (recognizing that serving papers without entering the mission may "constitute an infringement of the respect due to the mission" (citation omitted)).

Like each of the methods prescribed in §1608(a), service of process under §1608(a)(3) requires, among other things, transmission of the "summons" and "complaint." The complaint informs the defendant about the subject of the suit. *See* Fed. R. Civ. P. 8(a); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (recognizing that a complaint is designed "to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests") (alteration in original). The summons, which is issued and signed by an officer of the court and bears the seal of the court, "state[s] the time within which the defendant *must* appear and defend" and "notif[ies] the defendant that

a failure to appear and defend *will result in a default judgment* against the defendant for the relief demanded in the complaint." Fed. R. Civ. P. 4(a)-(b) (emphases added).

As this Court has described: "Service of summons is the procedure by which a *court . . . asserts jurisdiction* over the person of the party served." *Murphy Bros. v. Michetti Pipe Stringing*, 526 U.S. 344, 350 (1999) (emphasis added) (quoting *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 444-45 (1946)). This Court elaborated:

> [O]ne becomes a party officially, and is *required* to take action in that capacity, only upon service of a summons or other authority-asserting measure stating the time within which the party served must appear and defend. Unless a named defendant agrees to waive service, the summons continues to function as the *sine qua non directing* an individual or entity to participate in a civil action or forgo procedural or substantive rights.

Id. (emphases added) (internal citations omitted).

The official and coercive nature of a summons distinguishes its delivery from merely "mailing a letter" and constitutes a clear violation of mission inviolability under the Vienna Convention. *See* U.S. Br. 11 ("Mission inviolability means, among other things, that 'the receiving State * * * is under a duty to abstain from exercising any sovereign rights, in particular law enforcement rights, in respect of inviolable premises.'" (quoting Denza, *supra*, at 110)).

The Second Circuit also attempted to minimize the offense of permitting service "via" the embassy, stating that the foreign state's mission has "*less* sovereignty than the actual territory of the sending state." JA224 (emphasis in original); *see also* JA225 ("While the precise degree to which the sovereignty of the embassy is less than a state's control over its own territory is subject to debate, it is evident that an embassy is not *more* sovereign than the territory of the sending state itself." (emphasis in original)). But, the Second Circuit ignores that, under the Vienna Convention, the treaty parties have agreed that service of process sent into their diplomatic missions offends their sovereignty, and there is no similar international agreement to prohibit the delivery of service into the foreign state itself.

2.b. The Second Circuit's rule further violates the principle of mission inviolability by allowing private plaintiffs, through the clerk of the court, to dictate internal diplomatic procedures of the foreign state. To be effective, service of process on a foreign state "via" its embassy necessarily requires the foreign state's embassy to forward the service package to the head of the foreign ministry at the seat of government. Indeed, the Second Circuit found that the embassy's transfer of the service of process by diplomatic pouch to the foreign minister would be more reliable than a "direct mailing" that relied on "the capacity of the foreign postal service or a commercial carrier . . . ." JA182. In effect, the foreign state's embassy would act as an agent for service of process of either the clerk of the U.S. court or the plaintiffs in effecting the service of process.

This method of service violates not only mission inviolability but also the inviolability of the mission's official correspondence and diplomatic pouch. *See* Vienna Convention, art. 27(2) ("The official correspondence of the mission shall be inviolable."); *Report of the International Law Commission to the General Assembly*, 13 U.N. GAOR Supp. No. 9, at 19, U.N. Doc. A/3859 (1958), *reprinted in* [1958] 2 Y.B. Int'l L. Comm'n 78, U.N. Doc. A/CN.4/SER.A/1958/Add/1 (emphasizing "the overriding importance . . . of the principle of the inviolability of the diplomatic bag"). Like the United States, several other parties to the Vienna Convention agree. Br. of the Kingdom of Saudi Arabia as *Amicus Curiae* in Supp. of the Pet. for Cert., Apr. 10, 2017, at 10-11 ("The notion that an American court can dictate that contents of a diplomatic pouch for *mere convenience* of a litigant is repugnant to basic norms of international law."); United Arab Emirates *Amicus Curiae* Br. in Supp. of Pet'r, Apr. 10, 2017, at 7 (stating that "the panel's analysis assumes it is permissible and appropriate for Congress to commandeer an embassy's internal and protected processes for communicating with its home country . . . [It] offends all of the[] protections [afforded by Articles 22, 27, 29, 31, and 34 of the Vienna Convention, and] . . . mandates the ambassador to play the role of receiving agent for the foreign minister"); Note Verbale from the Austrian Embassy to the United States, Apr. 11, 2017, at ¶ 6 (enclosed with Suppl. Br. for Pet'r, Apr. 13, 2017) ("Article 22 of the [Vienna Convention] establishes that neither judicial nor administrative acts of public authority by the receiving state are to be exercised on the

premises of the diplomatic mission. This includes service of foreign legal documents, both directed at the diplomatic mission itself or at the respective foreign state."); Br. of *Amicus Curiae* Gov't of Nat'l Accord, State of Libya in Supp. of Pet'r, Apr. 10, 2017, at 4 (stating that "developing and transitional nations cannot afford the substantial risks of leaving service of process — and, by extension, the specter of default judgment — in the hands of often-transitory embassy staff who lack any delegated authority over legal matters from their home government. And, pursuant to the diplomatic inviolability guaranteed by treaty under Article 22 of the [Vienna Convention], they should not have to"). Where the parties to a treaty agree on its interpretation, U.S. courts must "defer to that interpretation . . . absent extraordinarily strong contrary evidence." *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982). The views of these member states must be afforded "considerable weight." *Water Splash*, 137 S. Ct. at 1512; *Abbott*, 560 U.S. at 16.

3. The Second Circuit also attempted to square its holding with the Vienna Convention by suggesting that Sudan had in any event consented to receive service at its embassy by failing to reject the package of service documents. JA223. Observing that the Vienna Convention "provides that a mission may 'consent' to entry onto its premises," the Second Circuit asserted that "[n]othing about our decision affects the ability of any state to refuse to accept service via its embassies." *Id.* The Second Circuit is incorrect that the failure of Sudan's Embassy to reject or return the service package excuses Plaintiffs'

improper service or the court's violation of the Vienna Convention.

First, neither Sudan, nor its Embassy, had any duty to reject improper service. *See, e.g., Magness*, 247 F.3d at 615-16 (holding that proper service on a state requires "strict compliance" with the terms of §1608); *Transaero*, 30 F.3d at 154 (same). And indeed, it remains questionable whether the Embassy in fact even had that option as a practical matter, as the only record evidence shows that the package was delivered to Charlotte Hall, Maryland, not the embassy's address in Washington, D.C. JA75.

Second, as the Second Circuit seemed to recognize (JA223), Article 22 of the Vienna Convention makes clear that the "agents of the receiving State may not enter" the premises of the mission "except with the consent of the *head of the mission*" (emphasis added). The head of the mission is the ambassador or chargé d'affaires, not a mail clerk or security guard who might sign for the package. *See* Vienna Convention, art. 1(a)-(b) ("The 'head of the mission' is the person charged by the sending State with the duty of acting in that capacity; The 'members of the mission' are the head of the mission and the members of the staff of the mission."). As the Fourth Circuit held: "Simple acceptance of the certified mailing from the clerk of court [by an embassy employee] does not demonstrate a waiver" of the Vienna Convention. *Kumar*, 880 F.3d at 157 n.9; *see also* U.S. Br. 15 (noting same). And, as the United States observed in its brief: "[N]o record evidence suggests that [Sudan's] Ambassador to the United States — the head of the mission —

was aware of, much less consented to receive, respondents' service of process." U.S. Br. 15-16.

Accordingly, there is simply no basis to sustain the Second Circuit's artificial distinction between service "on" an embassy and service "via" an embassy that could reconcile the court's opinion with the established principles of sovereignty and mission inviolability embodied in the Vienna Convention.

III. The FSIA's Legislative History Confirms That Congress Intended For §1608(a)(3) To Comport With The Vienna Convention And To Preclude Mailing Process To A Diplomatic Mission

In interpreting the FSIA, this Court has endorsed looking to legislative history to confirm the Court's reading of the statutory text. *See Samantar*, 560 U.S. at 316 n.9 ("[C]ommon sense suggests that inquiry benefits from reviewing additional information rather than ignoring it." (internal quotation marks omitted)). While resort to legislative (or statutory) history is not necessary for reversal here, that history confirms that Congress intended §1608(a)(3) to be interpreted consistent with U.S. treaty obligations under the Vienna Convention. *See Kumar*, 880 F.3d at 156 ("The House Judiciary Committee Report regarding the enactment of §1608(a) shows that the statute is meant to account for the United States' rights and obligations under the Vienna Convention." (citing H.R. Rep. No. 94-1487)). As the Seventh Circuit has explained, the FSIA's legislative history unequivocally indicates that service by mail upon an embassy is "precluded" under §1608(a)(3) "so as to avoid questions of inconsistency with section 1 of

Article 22 of the Vienna Convention on Diplomatic Relations." *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 253 (7th Cir. 1983) (quoting H.R. Rep. No. 94-1487, at 26, and holding that §1608(a)(3) service was improper because it had not been mailed to the head of Nicaragua's ministry of foreign affairs, but rather to the Nicaraguan Ambassador in Washington); *see also Autotech*, 499 F.3d at 748-49 (relying on FSIA's legislative history to hold service "through an embassy" is "precluded").

Contrary to the Second Circuit's suggestion that the legislative history is "sparse" and "sheds little light on the question" (JA181), in fact the legislative history of §1608 is extensive and establishes that service by mail via a foreign state's diplomatic mission was purposefully *excluded* from the version of §1608 that ultimately was enacted. The Second Circuit failed to seriously consider this history.

As the legislative history recounts, prior to the FSIA's enactment, there was "great uncertainty about the proper mode of service of process on foreign states." 119 Cong. Rec. 2218 (1973) (Proceedings & Debates of the 93d Congress); *see also id.* at 2216 (section-by-section analysis). Under one service method used before the FSIA's enactment, jurisdiction over a foreign state could be obtained by attaching the property of a foreign state. *Id.* at 2218. But this method of obtaining jurisdiction over a foreign state suffered from "a fatal logical flaw," because, among other reasons, the property attached could not be used to satisfy a judgment against the foreign state, even where the foreign state lacked immunity from suit. *Id.* (observing that that this

"made it seem nothing more than a technical procedural device with no basis in substance"). The provision for service of process in §1608 was "designed to replace the stopgaps and artificial devices that have been employed in the past." *Id.*

In 1973, the State and Justice Department "submitted jointly" the first version of the proposed bill that ultimately became the FSIA. *Id.* at 2215; *see also Helmerich*, 137 S. Ct. at 1320-21 (confirming the State Department's role in drafting the FSIA and quoting Hearing on H.R. 3493 before the Subcommittee on Claims and Governmental Relations of the House of Representatives Committee on the Judiciary, 93d Cong., 1st Sess., 18 (1973)); *see also Samantar*, 560 U.S. at 323 n.19 ("The FSIA was introduced in accordance with the recommendation of the State Department." (citing H.R. Rep. No. 94-1487, at 6)). That version allowed for service against a foreign state by "registered or certified mail . . . to the ambassador or chief of mission of the foreign state," but only in conjunction with service through diplomatic channels via the State Department. *E.g.*, S. 566, 93d Cong. §1608 (1973); 119 Cong. Rec. 2214. This dual-tracked service was designed to ensure that "the foreign state [was] notified even if through some error — such as the receipt of the mailed copy of a summons and complaint by a minor official who fail[ed] to bring it to the attention of the ambassador — the foreign state itself [did] not receive actual notice through the mail." 119 Cong. Rec. 2218. Unlike the Second Circuit's conclusion (JA182-183), this legislative history expresses the view that a mailing through a foreign state's embassy or mission alone would be unreliable.

The text of the bill, however, was later revised specifically due to concerns that a mailing to an embassy would violate Article 22 of the Vienna Convention. In July 1974, the State Department sent a diplomatic note to the heads of foreign missions in Washington, D.C., informing them about the draft bill and stating:

> Section 1608 of the proposed bill would provide for service of process in suits instituted against a foreign government through delivery of a copy of the summons by registered or certified mail to the ambassador or chief of mission of the foreign government concerned. The Department believes that such service may be beneficial to foreign governments in that it would provide an alternative to the disruptive practice of attachment of assets, such as bank accounts, of a foreign government for the purposes of jurisdiction. Nevertheless, it has come to the Department's attention that countries party to the Convention on Diplomatic Relations, signed at Vienna on April 18, 1961, would have a basis for objection to the propriety of process served in this manner [as proposed under the bill] under Article 22, section 1, of that Convention, as interpreted in light of the negotiating history of that Convention.

71 Dep't of State Bull. 429, 458-59 (1974) (quoting Diplomatic Note of July 11, 1974). The note further

stated that the Department of State was "considering an appropriate revision of the proposed bill dealing with service of process," and that "the Vienna Convention . . . , which has been ratified by the United States, forms part of the law of the United States; and any method of service inconsistent with the provisions of that Convention, as illuminated by the negotiating history, may be subject to challenge in the courts." *Id.*

Subsequently, in 1975 and 1976, the State and Justice Departments submitted revised companion bills to the House of Representatives (H.R. 11315, 94th Cong. (1975)) and the Senate (S. 3553, 94th Cong. (1976)). The bills included a "substantial revision of Section 1608 relating to service of process to conform with Article XXII of the Convention on Diplomatic Relations . . . ." 122 Cong. Rec. 17,465 (1976); H.R. Rep. No. 94-1487, at 45. Both bills removed completely service by mail on the foreign state addressed "to the ambassador or chief of mission" and instead required that the mailing be addressed "to the official in charge of the foreign affairs of the foreign state." 122 Cong. Rec. 17,464; H.R. Rep. No. 94-1487, at 45. A section-by-section analysis of S. 3553 confirms that the revised bill was prompted by "several foreign governments" that had "brought to the attention of the department of State that the drafters of the Vienna Convention had construed Article 22 as prohibiting the service of process or writ, 'even by post, within the premises of a diplomatic mission.'" 122 Cong. Rec. 17,469.

Further amendments to H.R. 11315 (which ultimately became the FSIA) revised §1608(a) to

require that mailed service be addressed "to the head of the ministry of foreign affairs of the foreign state concerned." 122 Cong. Rec. 33,536. The House Report on H.R. 11315 reiterated that the new §1608(a) precluded a mailing "to a diplomatic mission of the foreign state . . . so as to avoid questions of inconsistency with section 1 of article 22 of the Vienna Convention." H.R. Rep. No. 94-1487, at 26.

The Second Circuit considered the House Report but quickly dismissed it on the basis that the report "fails to make the distinction at issue in the instant case, between 'service *on* an embassy by mail,' and service on a minister of foreign affairs *via* or *in care of* an embassy." JA181 (alterations in original, internal citations omitted). The Second Circuit misread the report: the House Report reflects the Congressional intent to preclude service sent to or delivered to an embassy, *categorically*. H.R. Rep. No. 94-1487, at 26 (section-by-section analysis). And, again, the Second Circuit cited no authority to support its artificial distinction, beyond two cases of the Eastern District of Virginia that have since been overruled by the Fourth Circuit in *Kumar*. *See* JA179-180, JA182-183; *Kumar*, 880 F.3d at 159 (recognizing that its decision is in direct conflict with the Second Circuit's decision in *Harrison*).

IV. Foreign-Relations And Reciprocity Interests Of The United States Would Be Undermined If Mailing Process To A Diplomatic Mission Were Permitted Under §1608(a)(3)

The United States has already informed this Court that it agrees with Sudan that the text of

§1608(a)(3), the Vienna Convention, and the FSIA's legislative history foreclose service by mail to Sudan's Embassy. U.S. Br. 7 (stating that the Second Circuit's decision "contravenes the most natural reading of the statutory text, treaty obligations, and the FSIA's legislative history"). Those views are entitled to "great weight" and "special attention." *See Water Splash*, 137 S. Ct. at 1512 (quoting *Abbott*, 560 U.S. at 15); *Sumitomo*, 457 U.S. at 184 n.10; *Helmerich*, 137 S. Ct. at 1320. Beyond the deference owed to the views of the United States in respect of the FSIA and treaty interpretation, the United States has important interests that are threatened by the Second Circuit's holding.

This Court has long recognized that "foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). And in *Helmerich*, this Court credited the admonition of the Executive Branch against adopting an interpretation of the FSIA that "would 'affron[t]' other nations, producing friction in our relations with those nations and leading some to reciprocate." *Helmerich*, 137 S. Ct. at 1322 (alteration in original) (citation omitted). Here, the United States has stressed in its brief to this Court that the Second Circuit's interpretation of §1608(a)(3) — and its disregard for the Vienna Convention — "threatens harm to the United States' foreign relations." U.S. Br. 7. Indeed, this concern is not new: the United States over many years has repeatedly appeared in cases against foreign states to protest service of process delivered to foreign diplomatic missions in

the United States. *See, e.g.*, Pet. for Writ of Cert. 25-26 (citing Amicus Curiae Briefs and Statements of Interest of the United States as).

The United States has also explained here that the Second Circuit's decision creates a risk of reciprocal treatment in foreign courts:

> [T]he United States routinely refuses to recognize the propriety of service through mail or personal delivery by a private party or foreign court to a United States embassy. When a foreign litigant or court officer purports to serve the United States through an embassy, the embassy sends a diplomatic note to the foreign ministry in the forum state, explaining that the United States does not consider itself to have been served consistent with international law and thus will not appear in the litigation or honor any judgment that may be entered against it.

U.S. Br. 14. The United States has emphasized that it "has a strong interest in ensuring that its courts afford foreign states the same treatment to which the United States believes it is entitled under customary international law and the [Vienna Convention]." U.S. Br. 14. These concerns of reciprocal treatment are significant, as "[a]t any given time the Department of Justice's Office of Foreign Litigation represents the United States in about 1,000 cases in 100 courts around the world." *Helmerich*, 137 S. Ct. at 1322 (citing Brief for the United States as *Amicus Curiae*, at 21-22, *Bolivarian Republic of Venez. v. Helmerich*

& Payne Int'l Drilling Co., 137 S. Ct. 1312 (2017) (No. 15-423)). As the Fourth Circuit stated in *Kumar*: "Clearly, the United States cannot expect to receive treatment under the Vienna Convention that its own courts do not recognize in similar circumstances involving foreign states. This dilemma is avoided by the construction of subsection (a)(3) urged by the State Department." *Kumar*, 880 F.3d at 158.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Second Circuit and hold that the 2012 default judgment against Sudan is void and unenforceable.

Respectfully submitted,

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August 15, 2018

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ADDITIONAL PARTIES TO THIS PROCEEDING

The following entities, respondents on review, were defendants below. Pursuant to Rule 12.6 of this Court, Sudan states that it does not believe that these entities have an interest in the outcome of this case: Advanced Chemical Works, AKA Advanced Commercial and Chemical Works Company Limited, AKA Advanced Training and Chemical Works Company Limited; Accounts & Electronics Equipments, AKA Accounts and Electronics Equipments; Agricultural Bank of Sudan; Alaktan Cotton Trading Company, AKA Alaktan Trading Company; Advanced Commercial and Chemical Works Company Limited, AKA Advanced Chemical Works, AKA Advanced Trading and Chemical Works Company Limited; Advanced Mining Works Company Limited; Advanced Petroleum Company, AKA APCO; African Oil Corporation; Advanced Engineering Works; Advanced Trading and Chemical Works Company Limited, AKA Advanced Commercial and Chemical Works Company Limited, AKA Advanced Chemical Works; Al Sunut Development Company, AKA Alsunut Development Company; African Drilling Company; Al Pharakim, AKA Alfarachem Company Limited, AKA Alfarachem Pharmaceuticals Industries Limited, AKA Alfarakim; Alaktan Trading Company, AKA Alaktan Cotton Trading Company; Alfarachem Company Limited, AKA Al Pharakim, AKA Alfarachem Pharmaceuticals Industries Limited, AKA Alfarakim; Alfarakim, AKA Al Pharakim, AKA Alfarachem Pharmaceuticals Industries Limited, AKA Alfarachem Company

Limited; Alfarachem Pharmaceuticals Industries Limited, AKA Al Pharakim, AKA Alfarakim, AKA Alfarachem Company Limited; Alsunut Development Company, AKA Al Sunut Development Company; APCO, AKA Advanced Petroleum Company; Amin El Gezai Company, AKA El Amin El Gezai Company; Arab Cement Company; Arab Sudanese Blue Nile Agricultural Company; Assalaya Sugar Company Limited; Arab Sudanese Seed Company; Arab Sudanese Vegetable Oil Company; Atbara Cement Company Limited; Automobile Corporation; Babanousa Milk Products Factory; Bank of Khartoum; Bashaier; Blue Nile Brewery; Blue Nile Packing Corporation; Central Electricity and Water Corporation, AKA Public Electricity and Water Corporation; Building Materials and refractories Corporation; Coptrade Company Limited, Pharmaceutical and Chemical Division; Central Bureau of Statistics of the Republic of Sudan; El Amin El Gezai Company, AKA Amin El Gezai Company; Coptrade Eng and Automobile Services Co Ltd., AKA Kordofan Automobile Company; Duty Free Shops Corporation; El Nilein Bank, El Nilein Industrial Development Bank (Sudan), AKA El Nilein Industrial Development Bank Group, AKA Nilein Industrial Development Bank (Sudan); El Gezira Automobile Company; El Nilein Industrial Development Bank Group, AKA Industrial Bank of Sudan; Engineering Equipment Company; El Nilein Industrial Development Bank (Sudan), AKA El Nilein Bank, AKA El Nilein Industrial Development Bank Group, AKA Nilein Industrial Development Bank (Sudan); El Nilein Industrial Development Bank Group, AKA El Nilein Bank, AKA Nilein

Industrial Development Bank (Sudan), AKA El Nilein Industrial Development Bank (Sudan); El Taka Automobile Company, AKA Taka Automobile Company; Emirates and Sudan Investments Company Limited; Engineering Equipment Corporation; Exploration and production Authority, (Sudan); Farmers Bank for Investment & Rural Development, AKA Farmers Bank for Investment and Rural Development, AKA Farmers Commercial Bank, Sudan Commercial Bank; Sudan Commercial Bank; Farmers Bank for Investment and Rural Development, AKA Farmers Commercial Bank; Farmers Bank for Investment & Rural Development; Farmers Commercial Bank, AKA Farmers Bank for Investment and Rural Development, AKA Sudan Commercial Bank, AKA Farmers Bank for Investment & Rural Development; Friendship Spinning Factory; Food Industries Corporation; Forests National Corporation; Gezira Tannery; Gezira Automobile Company, AKA El Gezira Automobile Company; Gezira Scheme, AKA Sudan Gezira Board; Gezira Trade and Services Company Limited, AKA Gezira Trade & Services Company Limited; Gezira Trade & Services Company Limited, AKA Gezira Trade and Services Company Limited; Giad Automotive Company, AKA Giad Automotive Industry Company Limited, AKA Giad Cars & Heavy Trucks Company, Giad Cars and Heavy Trucks Company, Giad Automotive and Truck, AKA Giad Auto, AKA Giad Automotive; Giad Automotive and Truck, AKA Giad Automotive Company, AKA Giad Automotive Industry Company Limited, AKA Giad Cars & Heavy Trucks Company, AKA Giad Cars and Heavy Trucks Company; Giad Automotive Industry

Company Limited, AKA Giad Automotive Company, AKA Giad Cars & Heavy Trucks Company, AKA Giad Cars and Heavy Trucks Company, AKA Giad Automotive and Truck; Giad Cars & Heavy Trucks Company, AKA Giad Automotive Company, AKA Giad Automotive Industry Company Limited, AKA Giad Cars and Heavy Trucks Company, AKA Giad Automotive and Truck, AKA Giad Automotive Company, AKA Giad Automotive Industry Company Limited, AKA Giad Cars and Heavy Trucks Company, AKA Giad Automotive and Truck; Giad Industrial Group, AKA Sudan Master Tech, AKA Sudan Master Technology, AKA Giad Industrial City; Gineid Sugar Factory; Giad Cars and Heavy Trucks Company, AKA Giad Automotive Company, AKA Giad Automotive Industry Company Limited, AKA Giad Cars & Heavy Trucks Company, AKA Giad Automotive and Truck; Giad Motor Industry Company Limited; Giad Industrial City, AKA Giad Industrial Group, AKA Sudan Master Tech, AKA Sudan Master Technology; Giad Motor Company, AKA Giad Motor Industry Company Limited; Greater Nile Petroleum Operating Company Limited, AKA GNPOC; GNPOC, AKA Greater Nile Petroleum Operating Company Limited; Grouped Industries Corporation; Haggar Assalaya Sugar Factory; Hi Tech Group, AKA High Tech Group, AKA HighTech Group, AKA HiTech Group; HiConsult, AKA Hi-Consult; Gum Arabic Co. Ltd., AKA Gum Arabic Company, AKA GAC; Hicom, AKA Hi-Com; Guneid Sugar Company Limited, AKA Guneid Sugar Factory; Hi-Consult, AKA HiConsult; High Tech Group, AKA Hi Tech Group, AKA HighTech Group, AKA HiTech Group; HighTech Group, AKA Hi Tech

Group, AKA High Tech Group, AKA HiTech Group; Hi-Tech Chemicals; ICDB, AKA Islamic Co-Operative Development Bank; HiTech Group, AKA Hi Tech Group, AKA High Tech Group, AKA HighTech Group; Hi-Tech Petroleum Group; Industrial Bank Company for Trade & Development Limited, AKA Industrial Bank Company for Trade & Development Limited; Industrial Bank Company for Trade & Development Limited, AKA Industrial Bank Company for Trade & Development Limited; Industrial Production Corporation; Ingassana Mines Hills Corporation, AKA Ingessana Hills Mines Corporation; Industrial Bank of Sudan, AKA El Nilein Industrial Development Bank Group; Industrial Research and Consultancy Institute; Juba Duty Free Shop; Ingessana Hills Mines Corporation, AKA Ingassana Mines Hills Corporation; Islamic Co-Operative Development Bank, AKA ICDB; Karima Date Factory; Karima Fruit and Vegetable Canning Factory; Kassala Fruit Processing Company; Kassala Onion Dehydration Factory; Kenaf Socks Factory; Kenana Sugar Company Ltd.; Kenana Friesland Dairy; Kenana Engineering and Technical Services; Kenana Integrated Agricultural Solutions; Khartoum Gum Arabic Processing Company; Khartoum Central Foundry; Khartoum Tannery; Khartoum Commercial and Shipping Company Limited; Khartoum Refinery Company Ltd.; Khor Omer Engineering Company; Krikah Industries Group; Kordofan Automobile Company, AKA Coptrade Eng and Automobile Services Co Ltd.; Kordofan Company; Leather Industries Corporation, AKA Leather Industries Tanneries; Mangala Sugar Factory; Leather Industries Tanneries, AKA Leather Industries

Corporation; Malut Sugar Factory; Military Commercial Corporation; Maspio Cement Corporation; May Engineering Company; Ministry of Agriculture and Irrigation of the Republic of Sudan; Ministry of Animal and Fishery Resources and Pastures of the Republic of Sudan; Ministry of Commerce of the Republic of Sudan; Ministry of Environment, Forests and Physical Development of the Republic of Sudan; Ministry of Culture and Information of the Republic of Sudan; Ministry of Electricity & Water Resources of the Republic of Sudan; Ministry of Energy and Mining of the Republic of Sudan; Ministry of Federal Governance of the Republic of Sudan; Ministry of Finance and National Economy of the Republic of Sudan; Ministry of Foreign Affairs of the Republic of Sudan; Ministry of Foreign Trade of the Republic of Sudan; Ministry of Guidance and Endowments of the Republic of Sudan; Ministry of Health of the Republic of Sudan; Ministry of Higher Education and Scientific Research of the Republic of Sudan; Ministry of Human Resources Development & Labor of the Republic of Sudan; Ministry of Humanitarian Affairs of the Republic of Sudan; Ministry of Information and Communications of the Republic of Sudan; Ministry of Industry of the Republic of Sudan; Ministry of Interior of the Republic of Sudan; Ministry of Investment of the Republic of Sudan; Ministry of Justice of the Republic of Sudan; Ministry of Minerals of the Republic of Sudan; Ministry of Oil of the Republic of Sudan; Ministry of Social Welfare, Woman and Child Affairs of the Republic of Sudan; Ministry of Parliamentary Affairs of the Republic of Sudan; Ministry of Public Education of the Republic

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Airways, AKA Sudan Airways Co. Ltd., AKA Sudan Air; Sudan Exhibition and Fairs Corporation; Sudan Advanced Railways; Sudan Cotton Company Limited; Sudan Development Corporation; Sudan Gezira Board, AKA Gezira Scheme; Sudan Master Tech, AKA Giad Industrial City, AKA Giad Industrial Group, AKA Sudan Master Technology; Sudan Master Technology, AKA Giad Industrial City, AKA Giad Industrial Group, AKA Sudan Master Tech; Sudan National Broadcasting Corporation, AKA Sudan Radio & TV Corp., AKA Sudan Radio and TV Corp., AKA Sudan T.V. Corporation; Sudan Oil Corporation; Sudan National Information Center; Sudan Olympic Committee; Sudan National Petroleum Company, AKA Sudan Petroleum Company Limited, AKA Sudapet, AKA Sudapet Ltd.; Sudan Oil Seeds Company Limited; Sudan Petroleum Company Limited, AKA Sudapet, AKA Sudapet Ltd., AKA Sudan National Petroleum Company; Sudan-Ren Chemicals &Fertilizers Ltd.; Sudan Rural Development Company Limited; Sudan Radio & TV Corp., AKA Sudan National Broadcasting Corporation, AKA Sudan Radio and TV Corp., AKA Sudan T.V. Corporation; Sudan Soap Corporation; Sudan Radio and TV Corp., AKA Sudan National Broadcasting Corporation, AKA Sudan T.V. Corporation, AKA Sudan Radio & TV Corp.; Sudan Railways Corporation, AKA SRC; Sudan Shipping Line, AKA Sudan Shipping; Sudan T.V. Corporation, AKA Sudan National Broadcasting Corporation, AKA Sudan Radio and TV Corp., AKA Sudan Radio & TV Corp.; Sudan Tea Company, Ltd.; Sudan Telecom, AKA Sudan Telecom Group, AKA Sudatel Telecom Group, AKA Sudatel; Sudan Telecom Group, AKA

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Laboratories, AKA Wafra Pharma Laboratories; Wau Fruit and Vegetable Canning Factory; White Nile Battery Company; Wad Madani Duty Free Shop; White Nile Petroleum Operating Company, AKA WNPOC; Wafra Chemicals & Techno-Medical Services Limited, AKA Wafra Chemicals & Techno-Medical Services Limited; and White Nile Tannery.

28 U.S.C. §1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

28 U.S.C. §1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

* * *

28 U.S.C. §1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. §1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) IN GENERAL.—

(1) NO IMMUNITY.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) CLAIM HEARD. —The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism

when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) LIMITATIONS.—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104–208) not later than the latter of—

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) PRIVATE RIGHT OF ACTION.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In

any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) ADDITIONAL DAMAGES.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) SPECIAL MASTERS.—

(1) IN GENERAL.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) TRANSFER OF FUNDS.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) APPEAL.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) PROPERTY DISPOSITION.—

(1) IN GENERAL.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) NOTICE.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) ENFORCEABILITY.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) DEFINITIONS.—For purposes of this section—

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

28 U.S.C. §1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court

a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95

Article 22

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

Article 27

1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the receiving State.

2. The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.

3. The diplomatic bag shall not be opened or detained.

4. The packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use.

5. The diplomatic courier, who shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy person inviolability and shall not be liable to any form of arrest or detention.

6. The sending State or the mission may designate diplomatic couriers ad hoc. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge.

7. A diplomatic bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a diplomatic courier. The mission may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft.

Rule 4 of the Federal Rules of Civil Procedure
Summons

(a) CONTENTS; AMENDMENTS.

(1) *Contents.* A summons must:

(A) name the court and the parties;

(B) be directed to the defendant;

(C) state the name and address of the plaintiff's attorney or—if unrepresented—of the plaintiff;

(D) state the time within which the defendant must appear and defend;

(E) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint;

(F) be signed by the clerk; and

(G) bear the court's seal

(2) *Amendments.* The court may permit a summons to be amended.

(b) ISSUANCE. On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons—or a copy of a summons that is addressed to multiple defendants—must be issued for each defendant to be served.

* * *

(j) SERVING A FOREIGN, STATE, OR LOCAL GOVERNMENT.

(1) *Foreign State.* A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608.

* * *

No. 16-1094

In the Supreme Court of the United States

REPUBLIC OF SUDAN, PETITIONER

v.

RICK HARRISON, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether a service packet is "addressed and dispatched * * * to the head of the ministry of foreign affairs" of a foreign state, as required by 28 U.S.C. 1608(a)(3), when the service packet is sent by registered mail to the head of the ministry of foreign affairs of the foreign state at the state's embassy in the United States.

PARTIES TO THE PROCEEDING

Petitioner is the Republic of Sudan. Respondents are Rick Harrison; John Buckley, III; Margaret Lopez; Andy Lopez; Keith Lorensen; Lisa Lorensen; Edward Love; Robert McTureous; David Morales; Gina Morris; Martin Songer, Jr.; Shelly Songer; Jeremy Stewart; Kesha Stidham; Aaron Toney; Eric Williams; Carl Wingate; and Tracey Smith, as personal representative of the estate of Rubin Smith.

Petitioner lists numerous additional entities in the addendum to its brief. Those entities were not parties to the proceeding in the court of appeals, and they are therefore not parties to the proceeding in this Court under Rule 13.6.

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In the Supreme Court of the United States

No. 16-1094

REPUBLIC OF SUDAN, PETITIONER

v.

RICK HARRISON, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (J.A. 168-189) is reported at 802 F.3d 399. The opinion of the court of appeals denying panel rehearing (J.A. 207-230) is reported at 838 F.3d 86. The orders of the district court (J.A. 149-164) are unreported. The underlying opinion of the United States District Court for the District of Columbia entering a default judgment in favor of respondents (J.A. 84-139) is reported at 882 F. Supp. 2d 23.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 2015. A petition for panel rehearing was denied on September 22, 2016 (J.A. 207-230), and a petition for rehearing en banc was denied on December 9, 2016 (J.A. 231-232). The petition for a writ of certiorari was filed on March 9, 2017, and granted on June 25, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The relevant provision of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1608(a), provides:

> Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:
>
> > (1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or
> >
> > (2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or
> >
> > (3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

> (4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.
>
> As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

STATEMENT

This case concerns one of the provisions of the Foreign Sovereign Immunities Act governing service of process on a foreign state. Under 28 U.S.C. 1608(a)(3), a plaintiff may effect service by having a service packet "addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." The question presented here is whether that provision contains an additional, unstated requirement that a service packet addressed to the foreign minister be sent to him at the address of the foreign ministry in the foreign state.

Respondents are sailors and spouses of sailors wounded during the bombing of the USS *Cole*, the naval destroyer that was attacked by al Qaeda terrorists in 2000. Petitioner is the Republic of Sudan, a state sponsor of terrorism that harbored Osama bin Laden and other

members of al Qaeda. Respondents sued petitioner under the FSIA in the United States District Court for the District of Columbia, alleging that petitioner had provided material support to al Qaeda for the attack. Although petitioner had participated in earlier litigation by victims of the *Cole* bombing, it failed to appear in the District of Columbia action. After an evidentiary hearing, the district court entered a default judgment in favor of respondents.

Respondents subsequently secured turnover orders in the United States District Court for the Southern District of New York. After entering its first appearance in the litigation, petitioner appealed the turnover orders. As is relevant here, petitioner contended that service of process in the underlying proceedings was improper because the clerk of the court sent the service packet to petitioner's foreign minister at the Sudanese embassy in the United States, rather than at the foreign ministry in Khartoum.

The court of appeals affirmed. Rejecting petitioner's argument, the court of appeals reasoned that the relevant provision of the FSIA was "silent" as to the specific location where the mailing was to be sent; "[i]f Congress had wanted to require that the mailing be sent to the head of the ministry of foreign affairs in the foreign country, it could have said so." J.A. 178. The court of appeals' interpretation of the FSIA was correct, and its judgment should therefore be affirmed.

A. Background

1. The Foreign Sovereign Immunities Act authorizes suits against foreign states designated as state sponsors of terrorism that have provided material support for terrorist acts committed against American nationals. See 28 U.S.C. 1605A. For such suits, the FSIA confers subject-matter jurisdiction on the federal courts and provides that the foreign state is not immune from suit. See 28 U.S.C.

1330(a), 1604-1607. The current version of the FSIA authorizes the recovery of economic, noneconomic, and punitive damages. See 28 U.S.C. 1605A(c).

2. The FSIA also sets out the exclusive means for effecting service of process on a foreign state in cases in which the state is subject to suit. See 28 U.S.C. 1608(a). The statute prescribes four methods of service in descending order of preference; a plaintiff must attempt service by the first method, or determine that it is unavailable, before proceeding to the second and successive methods. See *ibid.*

Initially, a plaintiff is required to serve process "in accordance with any special arrangement for service between the plaintiff and the foreign state": for example, if there is a contract that specifies a method of service. 28 U.S.C. 1608(a)(1). If there is no such arrangement, the plaintiff may effect service "in accordance with an applicable international convention on service of judicial documents." 28 U.S.C. 1608(a)(2).

If there is no such convention, the plaintiff may then serve process under the provision at issue here, by

> sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.

28 U.S.C. 1608(a)(3). If service cannot be made within thirty days under that provision, a plaintiff may have the service documents "addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of

Special Consular Services," for transmission to the foreign state. 28 U.S.C. 1608(a)(4). Service of process under the FSIA, combined with subject-matter jurisdiction, confers personal jurisdiction over the foreign state. See 28 U.S.C. 1330(b).

B. Facts And Procedural History

1. This case arises out of one of the worst terrorist atrocities committed against the men and women who serve our country. On October 12, 2000, al Qaeda terrorists attacked the USS *Cole*, a naval destroyer, as it was refueling in the Port of Aden, Yemen. Suicide bombers in a small fiberglass boat approached the *Cole* and detonated their explosives. The blast, which hit when many of the crew were sitting down to lunch, blew a gaping hole in the port side of the ship. J.A. 95.

The bombing killed seventeen American sailors and wounded forty-two others. Fifteen men and two women (including the mother of a two-year-old) were among the dead; they ranged in age from 19 to 35. The injured included a sailor who suffered a "right femur [that] was broken four inches above the knee and had been completely folded behind his back so that his foot was now located near his head," and another who received burns to her face, neck, arms, and legs so severe that they took years to heal. J.A. 95, 106, 109.

For more than a decade, the victims of the *Cole* bombing and their families have engaged in tireless efforts to seek justice and to obtain compensation for their losses. Those efforts have focused on the Republic of Sudan, a rogue nation with a long history of harboring international terrorist groups. The leader of al Qaeda, Osama bin Laden, lived in Sudan for much of the 1990s. In 1993, the State Department designated Sudan a state sponsor of terrorism for its support of those groups. Today, Sudan

is one of only four countries still on that list, joined by Iran, Syria, and North Korea. See Department of State, *State Sponsors of Terrorism* <tinyurl.com/statesponsors> (last visited Sept. 18, 2018).

In 2004, family members of the deceased *Cole* sailors filed suit against Sudan in the United States District Court for the Eastern District of Virginia, alleging that Sudan had provided material support to al Qaeda for the attack. See *Rux* v. *Republic of Sudan*, Civ. No. 04-428 (filed July 16, 2004).

Sudan initially failed to appear, and the district court entered a default. See Fed. R. Civ. P. 55(a). Sudan later entered an appearance; it challenged the default, moved to dismiss, and then appealed from the district court's denial of its motion. See *Rux* v. *Republic of Sudan*, 461 F.3d 461, 466 (4th Cir. 2006), cert. denied, 549 U.S. 1208 (2007). Unsuccessful in all of those efforts, Sudan then thumbed its nose at the court, directing its attorneys not to participate in further proceedings. See *Rux* v. *Republic of Sudan*, 410 Fed. Appx. 581, 583 (4th Cir. 2011); D. Ct. Dkt. 176, at 35-37, *Kumar* v. *Republic of Sudan*, Civ. No. 10-171 (E.D. Va.). The district court ordered Sudan to file responsive pleadings on three separate occasions, but Sudan refused to do so. See D. Ct. Dkt. 176, at 35-37, *Kumar*, *supra*; D. Ct. Dkt. 53, 72, 116, *Rux*, *supra*.

The district court conducted a bench trial (which Sudan's counsel attended) and then entered judgment in favor of the plaintiffs. See *Rux* v. *Republic of Sudan*, 495 F. Supp. 2d 541, 543-544 (E.D. Va. 2007). In a lengthy written opinion, the court found that Sudan had provided critical assistance to al Qaeda and to bin Laden. See *id.* at 549-550. The court further determined that Sudan's actions had meaningfully contributed to the attack on the *Cole*, which was carried out by al Qaeda under bin Laden's direct supervision. See *id.* at 552-554. The court awarded

economic damages to the plaintiffs—the only damages available at the time. See *id.* at 565-569.

After the district court's decision, Congress amended the FSIA, expanding the available damages against state sponsors of terrorism to include noneconomic and punitive damages. See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 338-341 (codified at 28 U.S.C. 1605A). In 2010, the original *Rux* plaintiffs and other family members filed a new action against Sudan in the Eastern District of Virginia to take advantage of the broader category of damages now available. See *Kumar* v. *Republic of Sudan*, 880 F.3d 144, 151 (4th Cir. 2018), petition for cert. pending, No. 17-1269 (filed Mar. 9, 2018).

2. A few months later, respondents, a group of sailors injured in the bombing and their spouses, filed suit against Sudan in the United States District Court for the District of Columbia. As did the plaintiffs in the other cases, respondents invoked the court's jurisdiction under the FSIA, alleging that Sudan had provided material support to al Qaeda for the attack. J.A. 171.

Because respondents had no special arrangement with Sudan for service of process and because Sudan was not a party to any applicable international convention, the first two methods of service prescribed by the FSIA were unavailable. Accordingly, respondents, like the plaintiffs in the other cases, sought to serve Sudan by mail under 28 U.S.C. 1608(a)(3). J.A. 88, 171-172.

At respondents' request, the clerk of the court sent the necessary documents by certified mail, return receipt requested, to:

Republic of Sudan
Deng Alor Koul
Minister of Foreign Affairs
Embassy of the Republic of Sudan
2210 Massachusetts Avenue NW
Washington, DC 20008

J.A. 171-172. The clerk certified on the docket that the service packet had been sent to the head of the ministry of foreign affairs at the Sudanese embassy and that the signed receipt had been returned. Accordingly, the district court found that Sudan had "accepted service." Shortly after the service packet was delivered, an official from the Sudanese embassy met with counsel for respondents to discuss a potential resolution of the case. J.A. 88, 172; C.A. Dkt. 104, Ex. A, ¶¶ 2-4.

Despite accepting service (and despite selectively participating in the earlier *Rux* litigation), Sudan failed to enter an appearance or to participate in the proceedings. Respondents then obtained a default against Sudan. J.A. 88, 172.

3. Following the entry of default, the District of Columbia district court held an evidentiary hearing and then entered a default judgment in favor of respondents. J.A. 84-139. Like the *Rux* court, the district court found that Sudan had provided al Qaeda and bin Laden with substantial logistical and financial support: for example, by providing al Qaeda with diplomatic pouches to carry weapons across borders undetected; issuing diplomatic passports to al Qaeda members to facilitate their international travel; convening conferences where bin Laden and other terrorist leaders could plan terrorist activities; and financing terrorist training camps in Sudan. J.A. 96-104. The court further determined that Sudan's actions were

"critical" both to al Qaeda's development into a sophisticated terrorist network and to the attack on the *Cole* specifically. J.A. 102-104.

In calculating damages, the district court emphasized the severity of respondents' injuries. J.A. 104-123. The court ultimately awarded approximately $78 million in compensatory damages and $236 million in punitive damages. J.A. 81-82.

Respondents requested that the clerk of the court mail a copy of the court's judgment to Sudan's foreign minister at the Sudanese embassy in Washington, and the clerk certified that she had done so. J.A. 142-143, 172-173.

4. In 2012, respondents registered their judgment in the United States District Court for the Southern District of New York under 28 U.S.C. 1963, seeking to satisfy the judgment through orders to various banks to turn over Sudanese assets frozen under the then-applicable sanctions regime. Both the District of Columbia and New York district courts certified that a reasonable period of time had elapsed from entry of the judgment for respondents to execute on and attach Sudanese assets. Sudan did not challenge those certifications. J.A. 173-174.

A few months later, the New York district court issued the turnover orders that are the subject of this case. Sudan then entered its first appearance in this litigation: it filed notices of appeal from the turnover orders, claiming that the underlying judgment entered in the District of Columbia was void for lack of personal jurisdiction on the ground that the service packet had been sent to the foreign minister at the Sudanese embassy in the United States, rather than at the foreign ministry in Khartoum. J.A. 174-175.

5. The court of appeals affirmed. J.A. 168-189. As is relevant here, the court held that mailing the service packet to the foreign minister at the Sudanese embassy in

the United States complied with the requirements of Section 1608(a)(3). J.A. 175-183.

The court of appeals explained that Section 1608(a)(3), on its face, requires that the service packet be mailed "to the head of the ministry of foreign affairs," but that the statute "is silent as to a specific location where the mailing is to be addressed." J.A. 178 (citation omitted). The court reasoned that, "[i]f Congress had wanted to require that the mailing be sent to the head of the ministry of foreign affairs in the foreign country, it could have said so." *Ibid.* Congress did just that in the following provision, the court observed, when it "specified that the papers be mailed 'to the Secretary of State in Washington, District of Columbia.'" J.A. 178-179 (quoting 28 U.S.C. 1608(a)(4)). The court reasoned that "[n]othing in [Section] 1608(a)(3) requires that the papers be mailed to a location in the foreign state," and it added that "service on a minister of foreign affairs via an embassy address constitutes literal compliance with the statute." J.A. 179.

The court of appeals then addressed the legislative history of Section 1608(a)(3). The court found the legislative history to be "sparse" and to "shed[] little light on the question" whether service could be sent to a foreign minister at the foreign state's embassy. J.A. 181. The court noted the House Report on the FSIA had suggested that service on an embassy would be inconsistent with the Vienna Convention on Diplomatic Relations, which provides that "[t]he premises of [a] mission shall be inviolable" and that "[a] diplomatic agent shall * * * enjoy immunity." J.A. 181-182 (citation omitted). But, the court explained, it did "not see how principles of mission inviolability and diplomatic immunity are implicated" by "service on the foreign minister *via* [an] embassy address." J.A. 182. Because "service was directed to the right individual, using the Sudanese Embassy address for transmittal," the

court concluded that respondents had "complied with the plain language of the FSIA's service of process requirements at 28 U.S.C. § 1608(a)(3)." J.A. 182-183.

6. Sudan filed a petition for rehearing; the United States filed an amicus brief supporting the petition. The court of appeals denied Sudan's petition for panel rehearing without recorded dissent, issuing a new opinion in which it addressed the government's arguments. J.A. 207-230.

The court of appeals again explained that, "[o]n its face, the statute does not specify a location where the papers are to be sent; it specifies only that the papers are to be addressed and dispatched to the head of the ministry of foreign affairs." J.A. 213. The court emphasized that "[a] mailing addressed to the minister of foreign affairs via Sudan's embassy in Washington, D.C., was consistent with the language of the statute." J.A. 214. It again declined "to read the words 'at his or her regular place of work' or 'at the state's seat of government' into the statute." J.A. 215-216.

The court of appeals reiterated that the packet was not served *on* the embassy as an agent for Sudan; instead, it was mailed to the foreign minister *via* the embassy, a "natural" way of reaching him. J.A. 216-217. If the embassy did not believe that the minister could be reached at its address, it could have "rejected the mailing." *Ibid.* Instead, the court noted, it "accepted the papers" on behalf of the foreign minister and "explicitly acknowledged receipt." J.A. 217.

The court of appeals then addressed the new argument that its interpretation of Section 1608(a)(3) would "place[] the United States in violation of the Vienna Convention." J.A. 220-221. The court noted that the relevant provisions of the Vienna Convention "preclude service of

process on an embassy or diplomat as an agent of a foreign government." J.A. 222. But "that is not what happened here." *Ibid.* The service at issue did not implicate the Vienna Convention, the court explained, because "process was served on the Minister of Foreign Affairs at the foreign mission and not on the foreign mission itself or the ambassador." *Ibid.*

The court of appeals further recognized the United States' policy of rejecting service delivered to its embassies abroad, but it explained that its interpretation of Section 1608(a)(3) "does not affect this policy." J.A. 222. The court made explicit that the United States and any other country may enforce a "policy of refusing to accept service via its embassies." *Ibid.* Sudan, however, "did not elect to follow any such policy" and "did not reject the service papers," as it could "easily" have done. J.A. 223.

Finally, the court of appeals rejected Sudan's arguments, raised for the first time in its reply brief at the rehearing stage, that the service packet was not actually accepted by Sudan or delivered to the Sudanese minister of foreign affairs. J.A. 225-226. The court held that this argument came too late and was "not properly before [the court]." J.A. 226. Accordingly, its resolution of the legal issue turned on the undisturbed premise that the embassy "accepted the papers" addressed to the foreign minister, "signing for them and sending back a return receipt" to the clerk. J.A. 216.

The court of appeals subsequently denied Sudan's petition for rehearing en banc without recorded dissent. J.A. 231-232.[1]

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[1] While its appeal was still pending in the court of appeals, Sudan entered an appearance in the District of Columbia district court and moved to vacate the underlying judgment under Federal Rule of Civil Procedure 60(b); it raised several arguments, including the argument

7. The new lawsuit filed by the original *Rux* plaintiffs, meanwhile, proceeded in much the same manner, but with the opposite result. At the plaintiffs' request, the clerk of the court sent the necessary documents by certified mail, return receipt requested, to Sudan's minister of foreign affairs at the Sudanese embassy in Washington. See *Kumar*, 880 F.3d at 151. The embassy accepted the service packet and signed the certified-mail receipt. See *ibid.*

As in this case, Sudan initially failed to appear, and the district court entered a default judgment against it. See *Kumar*, 880 F.3d at 151. Sudan then entered an appearance and moved to vacate the default judgment on the ground that service was improper. See *id.* at 152. The district court denied Sudan's motion, expressly agreeing with the court of appeals' reasoning in this case and holding that "the text of [Section] 1608(a)(3) does not prohibit service on the Minister of Foreign Affairs at an embassy address." Dkt. 176, at 28-29, *Kumar*, *supra*.

The Fourth Circuit reversed and remanded. See *Kumar*, 880 F.3d at 150. It acknowledged that the text of the FSIA does not specify a location where the service packet must be sent, but it nevertheless held that the packet must be sent to the foreign minister at the address of the foreign ministry in the foreign state in order to be effective. See *id.* at 155. The plaintiffs filed a petition for a writ of certiorari, which is currently pending before this Court. See No. 17-1269 (filed Mar. 9, 2018).

The plaintiffs in *Kumar* have since attempted to serve Sudan by sending service packets to Sudan's foreign minister at the foreign ministry in Khartoum. Consistent with its tactics throughout the *Cole* litigation, however,

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concerning service at issue here. See Dkt. 55-1, at 29-31, *Harrison* v. *Republic of Sudan*, Civ. No. 10-1689 (D.D.C.). That motion remains pending.

Sudan did not sign the return receipts. See D. Ct. Dkt. 213, at 3 n.2, *Kumar*, *supra*. The plaintiffs obtained an extension of the court-ordered deadline for service and are now attempting to serve process on Sudan, at great cost, through diplomatic channels under Section 1608 (a)(4). See *id.* at 3-5.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the relevant provision of the FSIA, Section 1608(a)(3), does not contain an additional, unstated requirement that a service packet addressed to a foreign minister be sent to him at the address of the foreign ministry in the foreign state. The judgment of the court of appeals should therefore be affirmed.

A. Section 1608(a)(3) requires that a service packet be "addressed and dispatched" to the foreign minister. See 28 U.S.C. 1608(a)(3). That language requires that the service packet be directed to the foreign minister ("addressed") and sent to him in an expeditious manner ("dispatched"). It does not mandate a particular location where the packet should be sent.

It is a rudimentary principle of statutory interpretation that, where a statute omits a requirement, the requirement cannot be supplied by the courts. So too here. That principle has particular force in interpreting Section 1608(a)(3) because Congress did include a location requirement in the very next paragraph, requiring the packet to be addressed and dispatched to the Secretary of State "in Washington, District of Columbia." Congress also specified a location in numerous other service provisions in the United States Code. Petitioner's interpretation would rewrite Section 1608(a)(3) to add a requirement that Congress knew how to include but chose to omit.

B. Petitioner's contrary arguments are unavailing. It contends that the term "addressed" is naturally read to preclude service at the foreign state's embassy. But that is incorrect. A statute could easily provide for service addressed and dispatched to the foreign minister "at the foreign state's American embassy," precisely because nothing in the phrase "addressed and dispatched" forecloses that location.

Nor can petitioner get to its desired interpretation by pointing to the "signed receipt" requirement. Because a service packet is ordinarily accepted and signed for by a mailroom employee, the signed receipt establishes only that the foreign state has accepted the service packet on the foreign minister's behalf. The same is true regardless of whether the service packet is sent to the embassy or to the foreign ministry. And if timely delivery to the foreign minister does not occur, the foreign state can challenge any resulting default, and even a subsequent entry of a default judgment, by coming forward with a valid justification.

Petitioner's policy arguments similarly lack merit. Permitting a service packet to be mailed to the foreign minister at the embassy address does not place an improper burden on the embassy, which can decline to sign for a packet addressed to the foreign minister if it does not wish to transmit the packet. In this case, the clerk of the court certified that petitioner had signed for the packet, thereby implicitly agreeing to transmit it to the addressee. Under those circumstances, it would be grossly unfair to hold that respondents failed to perfect service simply because they failed to intuit and then comply with petitioner's additional, atextual requirement.

C. Petitioner, joined by the government, heavily relies on the argument that its proposed interpretation is required to avoid a conflict with the Vienna Convention on

Diplomatic Relations. As a preliminary matter, because the text of Section 1608(a)(3) is unambiguous, the Vienna Convention is irrelevant here.

In any event, petitioner and the government badly misconstrue the Convention. Article 22, which establishes the inviolability of diplomatic premises, says nothing about service by mail. Mailing is not a trespass; mail routinely arrives at embassies without raising questions under the Convention.

In arguing to the contrary, petitioner and the government rely on language in a preliminary 1957 report of the International Law Commission. Astoundingly, however, they fail to mention that the final 1958 report of the Commission takes the opposite position, clarifying that Article 22 does not prevent service by mail. Just as astoundingly, petitioner and the government ignore a recent decision of the Supreme Court of the United Kingdom, a sister signatory to the convention, which held that the Vienna Convention does not prohibit the service of process by mail at diplomatic premises. That is decidedly the better view, and the plain-text interpretation of Section 1608(a)(3) is therefore consistent with the Vienna Convention. Particularly because the government has taken inconsistent positions on the interpretation of the Vienna Convention (yet another inconvenient fact the government ignores), its current position is entitled to little weight.

D. Because of the text of Section 1608(a)(3) is unambiguous, this Court should not consider the legislative history. In any event, the legislative history sheds little light on the question in this case. While petitioner and the government cite the House Judiciary Committee's report, that report seemingly addresses the discrete issue of service on an ambassador. Petitioner's insistence that Con-

gress intended to foreclose service at the embassy address is belied by Congress's silence on the question in Section 1608(a)(3).

E. Finally, the government contends that its interpretation is necessary to protect an interest in reciprocal treatment. But the government ignores the fact that the United States does not accept process *in any manner* contemplated by Section 1608(a)(3)—whether at an embassy or even at the State Department itself. As a result, the government has no institutional stake in the outcome of the question presented.

Under those circumstances, it is mind-boggling that the government has decided in this case to side with a state sponsor of terrorism and against men and women who are seeking to recover for grievous injuries suffered in the service of our country. In any event, this Court should reject the government's sloppy analysis and its dubious bottom line. The court of appeals correctly held that, under the plain language of Section 1608(a)(3), respondents properly served petitioner. Its judgment should be affirmed.

ARGUMENT

UNDER THE FSIA, A PLAINTIFF MAY EFFECT SERVICE ON A FOREIGN STATE BY MAILING A SERVICE PACKET TO THE FOREIGN MINISTER AT THE FOREIGN STATE'S EMBASSY IN THE UNITED STATES

A. The Text Of Section 1608(a)(3) Unambiguously Permits Mailing The Service Packet To The Foreign Minister At The Foreign State's Embassy In The United States

Under 28 U.S.C. 1608(a)(3), a plaintiff may effect service by "sending" a service packet "addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." The

question in this case is whether the "addressed and dispatched" requirement is satisfied where, as here, the service packet is addressed to the foreign minister and delivered to the foreign state's embassy in the United States. The answer to that question is plainly yes, because Section 1608(a)(3) does not specify a particular location where the service packet should be sent.

1. The natural meaning of the verb "address" is "[t]o send as a written message to (some one); to write (anything) expressly that it may reach and be read by some one; to destine, inscribe, dedicate." *Oxford English Dictionary* 105 (1st ed. 1933); see *Webster's Second New International Dictionary* 30 (1959) (defining "address" as "[t]o direct, as words (to anyone or anything)," "especially * * * to some particular person or persons"); *Random House Dictionary* 17 (1973) (defining address as "[t]o direct a * * * written statement to"; "[t]o direct to the ear or attention"; "to put the directions for delivery on"). The verb "dispatch," in turn, means "[t]o send off posthaste or with expedition or promptitude." *Oxford English Dictionary* 478; see *Webster's Second New International Dictionary* 750 (defining "dispatch" as "[t]o send off or away with promptness or speed, esp. on official business"); *Random House Dictionary* 413 (defining "dispatch" as "to send off or away with speed"). Accordingly, Section 1608(a)(3) requires that a service packet be directed to the foreign minister ("addressed") and sent to him in an expeditious manner ("dispatched").

Respondents plainly complied with that requirement. The clerk of the court sent the service packet by certified mail, return receipt requested, directed to petitioner's

foreign minister.[2] And the packet was sent to the foreign minister at petitioner's embassy in the United States—which, like any other embassy, serves as a component and extension of the foreign ministry, with a direct line of reporting and communication to the foreign minister. See Ludwik Dembinski, *The Modern Law of Diplomacy* 31-32 (1988); Embassy of the Republic of Sudan in the United States, *Sudan's Foreign Policy* <tinyurl.com/sudaneseembassy> (last visited Sept. 18, 2018).

The question in this case is whether Section 1608(a)(3) contains an additional requirement that the service packet be sent to the foreign minister at the address of the foreign ministry in the foreign state. But nothing in the text of Section 1608(a)(3) supports such a requirement. The term "address" merely contemplates the identification of an addressee to whom the packet is directed, without mandating a *particular* location at which the addressee is to be reached. And the term "dispatch" requires only that the packet be sent in an expeditious manner, again without mandating a particular location where the packet should be sent.

Other textual cues are to the same effect. For example, later in Section 1608(a), the statute defines a "notice of suit" as a "notice addressed to a foreign state." The term "addressed" introduces the entity to which the notice must be directed (the "foreign state"), but it in no way

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[2] Petitioner suggests in passing (Br. 7) that the foreign minister named on the envelope had left office a few months earlier. Even assuming it were true, that assertion (which petitioner raised for the first time in its reply brief at the rehearing stage and which the court of appeals did not consider) is beside the point, because the envelope clearly identified the recipient in his official capacity as the "Minister of Foreign Affairs." Addressing the service packet to the foreign minister by title is sufficient. See *Barot* v. *Embassy of Zambia*, 785 F.3d 26, 30 (D.C. Cir. 2015).

mandates where the notice must be sent. Because "identical words used in different parts of the same statute are generally presumed to have the same meaning," it follows that "addressed" in Section 1608(a)(3) contemplates the *who* but does not specify the *where*. *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 34 (2005); see, *e.g.*, *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017).

Notably, every court to have considered the question has recognized that "the text [of Section 1608(a)(3)] does not specify a geographic location for the service of process." *Kumar* v. *Republic of Sudan*, 880 F.3d 144, 155 (4th Cir. 2018), petition for cert. pending, No. 17-1269 (filed Mar. 9, 2018). The phrase "address[] and dispatch[]" "does not meaningfully limit the geographic location where service is to be made"; at most, it "reinforce[s] that the location must be related to the intended recipient." *Ibid.*; see J.A. 178; Dkt. 176, at 28-29, *Kumar* v. *Republic of Sudan*, Civ. No. 10-171 (E.D. Va.); *Rux* v. *Republic of Sudan*, Civ. No. 04-428, 2005 WL 2086202, at *16 (E.D. Va. Aug. 26, 2005).

The plain language of Section 1608(a)(3) is dispositive. It is a rudimentary principle of statutory interpretation—in fact, a principle "so obvious that it seems absurd to recite it"—that, where a statute omits a requirement, "[t]he absent provision cannot be supplied by the courts." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93-94 (2012) (Scalia & Garner). Instead, "a matter not covered is to be treated as not covered." *Id.* at 93. This Court has routinely refused to "add an extra clause" to the text of a statute because doing so "is not a construction of a statute, but, in effect, an enlargement of it by the court." *Nichols* v. *United States*, 136 S. Ct. 1113, 1118 (2016) (citation omitted); see, *e.g.*, *Iselin* v. *United States*, 270 U.S. 245, 251 (1926); *United*

States v. *Union Pacific Railroad*, 91 U.S. (1 Otto) 72, 85 (1875).

Adding a location requirement would "[]supplement[]" the statute in just that (impermissible) way. See Scalia & Garner 98. While Section 1608(a)(3) is punctilious as to the form of mail that must be used (one requiring a signed receipt), the identity of the sender (the clerk of the court), and the identity of the recipient (the foreign minister), the statute is silent as to the location *where* the service packet should be sent.

2. If Congress had wished to specify the location where the service packet should be sent, it could and surely would have done so explicitly: for example, by adding a phrase such as "at the ministry" or "in the foreign state's seat of government" to the end of Section 1608 (a)(3).

a. In fact, Congress did exactly that in the very next paragraph. Section 1608(a)(4), which provides for service through diplomatic channels, requires that the service packet be "addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia." That provision specifies not only the who, but also the where, for the mailing of the service packet.

The inclusion of a location in an immediately adjacent provision with a strikingly parallel construction strongly suggests that Congress acted deliberately in declining to specify a location in Section 1608(a)(3). See *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 452 (2002). As this Court explained in addressing another question under the FSIA last Term, "[h]ad Congress likewise intended [the provision] to have such an effect, it knew how to say so." *Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816, 826 (2018).

b. Section 1608(a)(4) is hardly unusual in this respect. In service provisions throughout the United States Code, Congress routinely provides for materials to be addressed

to an individual at a particular location when Congress intends to require delivery at that location. See, *e.g.*, 21 U.S.C. 355(g) (providing for service by "mail addressed to the applicant or respondent at his last-known address in the records of the Secretary [of Health and Human Services]"); 28 U.S.C. 1866(b) (providing for service by "mail addressed to such person at his usual residence or business address"); 33 U.S.C. 912(c) (requiring notice "by mail addressed to [the employer] at his last known place of business"); 47 U.S.C. 325(e)(2) (directing that a complaint be sent by United States mail "addressed to the chief executive officer of the satellite carrier at its principal place of business"); cf. Fed. R. Civ. P. 4(i)(1)(B) (providing for service "by registered or certified mail to the Attorney General of the United States at Washington, D.C.").

As this Court has explained, it is "particularly inappropriate" to "[d]raw[] meaning from [Congress's] silence" when "Congress has shown that it knows how to [address an issue] in express terms" in other statutes. *Kimbrough* v. *United States*, 552 U.S. 85, 103 (2007). In Section 1608(a)(3)—unlike Section 1608(a)(4) and multiple other statutes—Congress required only that the service packet be addressed and dispatched to the foreign minister. As long as the packet is directed to the correct individual and sent in an expeditious manner, Congress was agnostic about the location where the packet is sent. The import of Congress's silence is especially clear here, and the Court should not rewrite the statute to add a limitation that Congress knew how to include but chose to omit.

3. The statutory text should be the beginning and the end of the matter here. "[W]hen [a] statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Sebelius* v. *Cloer*, 569 U.S. 369, 381 (2013) (citation omitted).

Far from being absurd, Congress's decision to leave the location of the mailing open, as long as the mailing is sent to the foreign minister in an expeditious manner, is entirely logical. Indeed, mailing a service packet to a foreign minister at the foreign state's embassy may be a particularly effective way to reach the minister—especially where, as here, mail service to the relevant country is likely to be unreliable. As the court of appeals recognized, "direct mailing relies on the capacity of the foreign postal service or a commercial carrier," whereas the embassy, as an arm of the foreign ministry, can, if it accepts service, transmit the service packet to the foreign minister "by diplomatic pouch." J.A. 182.

By contrast, requiring mailing to the foreign ministry would increase the frequency with which Section 1608(a)(3) service fails, with the accompanying delay, cost, and uncertainty for the plaintiffs whom the FSIA sought to protect. See D. Ct. Dkt. 213, at 2-5, *Kumar*, *supra* (detailing the challenges of attempted service in Khartoum, including the failure to receive return receipts within the statutory time period); 22 C.F.R. 22.1 (setting $2,275 fee for service under Section 1608(a)(4)). Further, to the extent that imposing such a judicially created requirement would result in the more frequent use of Section 1608(a)(4), which puts American diplomats in the position of serving process on foreign states, that would be an undesirable outcome from a comity perspective—likely why Congress provided for service through diplomatic channels only as a last resort. See 28 U.S.C. 1608(a).

B. Petitioner's Alternative Interpretation Is Contrary To The Plain Text Of Section 1608(a)(3)

Petitioner's arguments in support of an additional requirement that the service packet be sent to the address of the foreign ministry are unavailing.

1. a. Petitioner contends that the term "addressed" dictates the location for the service of process, arguing that the service packet "must be sent to the address of the head of the ministry of foreign affairs in the foreign state." Br. 22. As we have already explained, that is incorrect as a textual matter. The statute requires only that the packet be directed to the foreign minister and sent in an expeditious manner, not that it be sent to the foreign minister at a particular location. See pp. 19-22, *supra*. And when Congress wishes to specify the location of service, it does so expressly. See pp. 22-23, *supra*. If the mere use of the term "address" implied "send to the addressee's primary place of business," Congress would have littered the United States Code with needless surplusage. See, *e.g.*, 28 U.S.C. 1866(b); 47 U.S.C. 325(e)(2).

Petitioner does not contend that Section 1608(a)(3) unambiguously supports its interpretation. Instead, it contends only that its interpretation is the "natural reading" of the text. Br. 22. But even that contention is incorrect, and a simple example shows why. Suppose the statute expressly provided that the service packet be "addressed and dispatched to the head of the ministry of foreign affairs of the foreign state concerned at the foreign state's American embassy," or "addressed and dispatched to the Secretary of State at 1801 North Lynn Street, Arlington, VA 22209." See Department of State, *Contact Us* <tinyurl.com/clearanceaddress> (last visited Sept. 18, 2018) (listing the Arlington address for the State Department). There would be nothing unnatural about either of those provisions, precisely because nothing in the phrase "addressed and dispatched" excludes the use of those locations.

In a related vein, petitioner contends (Br. 22) that, because the service packet was sent to the foreign minister at the Sudanese embassy, he was not thereby served at

his own address. Once again, Congress did not specify in this statute (unlike in others) which address should be used. But petitioner's contention simply begs the question: after all, the district court found that the Sudanese embassy had accepted the service packet on the foreign minister's behalf. J.A. 88, 216-217. In light of that finding, petitioner cannot articulate why the embassy address was not the minister's in the sense relevant here.[3]

For its part, the government complains that nothing in Section 1608(a)(3) affirmatively suggests that "Congress expected foreign ministers to be served at locations removed from their principal place of performance of their official duties." Br. 14. But that gets the relevant inquiry exactly backwards, faulting Congress for failing to *reject* a limitation that is not contained in the statutory text. Congress did not need to specify that a notice of suit could be prepared in a typeface other than Times New Roman, even if Times New Roman is the most commonly used typeface in legal documents. So too here, if Congress had intended to impose a limitation on the location for the service of process, it would have done so in "clear language." Scalia & Garner 93 (citation omitted).

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[3] Although petitioner attempts to generate doubts about whether the embassy and the minister in fact received the service packet, see Br. 7-8, 48, the court of appeals held that those arguments, raised for the first time in petitioner's reply brief at the rehearing stage, were not properly before it. J.A. 225-226; cf. Pet. C.A. Br. 4-12. What is more, petitioner affirmatively disclaimed those arguments in its briefs at the certiorari stage, arguing that the only "relevant" facts to the question presented were "undisputed." Pet. Cert. Reply Br. 4. Finally on this point, the underlying factual finding by the District of Columbia district court that petitioner had accepted service would be reviewable, if at all, only for clear error, see, *e.g.*, *Gates* v. *Syrian Arab Republic*, 646 F.3d 1, 4 (D.C. Cir.), cert. denied, 565 U.S. 945 (2011), and petitioner points to nothing that would remotely satisfy that deferential standard here.

b. Looking beyond the terms "addressed" and "dispatched," petitioner focuses on the "signed receipt" requirement, arguing that a signed receipt "cannot verify delivery to the head of the ministry" when the service packet is sent to the embassy address. Br. 22. But the same is true when a service packet is sent to the address of the foreign ministry: the packet will ordinarily be accepted and signed for by a mailroom employee, not by the foreign minister himself. A signed receipt establishes that the foreign state has accepted the service packet on the foreign minister's behalf; it can never guarantee that delivery to the foreign minister (or to the responsible official) in fact occurs.

What is more, if timely delivery does not occur, the foreign state has protection above and beyond the requirement of strict compliance with the FSIA. Consistent with Civil Rule 55(c), a foreign state can challenge the entry of default upon a showing of good cause, and it can challenge even the subsequent entry of a default judgment by showing, *inter alia*, that its failure to respond to the complaint was not willful. See, *e.g.*, *Hilt Construction & Management Corp.* v. *Permanent Mission of Chad to United Nations*, Civ. No. 16-6421, 2017 WL 4480760, at *2-*3 (S.D.N.Y. Oct. 6, 2017) (vacating a default judgment where the service packet was sent to the foreign ministry but not opened in time to file a response).

In support of its reliance on the "signed receipt" requirement, petitioner points to Section 1608(c)(2) and (d), which together provide that a foreign state must respond to a complaint within 60 days of the date on the signed receipt. If Congress had intended to permit mailing to the embassy, petitioner contends, it "likely" would have used the date of delivery as the trigger for the 60-day period (or otherwise provided for "extra time"). Br. 23. That is

incorrect. Indeed, under the regulations governing service under Section 1608(a)(4), when the Secretary of State delivers a service packet to an embassy, it uses the date of that delivery (rather than the ultimate receipt by the foreign ministry) as the relevant trigger. See 22 C.F.R. 93.1(e).

In any event, notifying the foreign minister of the suit and conveying the service packet need not take any significant time: an embassy can transmit the materials expeditiously using a diplomatic pouch, secure fax, or secure e-mail, just as it would for any other time-sensitive business. See Anthony Aust, *Handbook of International Law* 122 (2d ed. 2010). If transmission is delayed, the foreign state can challenge an ensuing default upon a showing of good cause. See p. 27, *supra*. And an embassy that believes it would be time-consuming or inconvenient to transmit the materials to the foreign minister can decline to sign a receipt for a package addressed to the minister, causing service under Section 1608(a)(3) to fail (an option it does not have for service under Section 1608(a)(4)). See pp. 33-34, *infra*.

2. Unable to support the proposition that Section 1608(a)(3) itself requires that the service packet be sent to the address of the foreign ministry, petitioner attempts to back into such a requirement through Section 1608(b), which governs service on an agency or instrumentality of a foreign state. See Br. 23-24. That effort is unavailing.

Section 1608(b)(2), the counterpart to Section 1608 (a)(2) for service under an international convention, provides for service by "delivery" of the service packet to "an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States." 28 U.S.C. 1608(b)(2). Like Section 1608(a)(3), Section 1608(b)(2) specifies only the person who must be the ultimate recipient of the packet.

In the case of Section 1608(a)(3), the packet must be sent to the foreign minister; in the case of Section 1608(b)(2), it must be delivered to an officer or agent of the agency or instrumentality. Neither provision prescribes the location where the packet must be addressed.

Petitioner suggests (Br. 24) that, without an implicit location requirement, Section 1608(a)(3) would effectively grant permission to send the service packet to an agent in lieu of the foreign minister. Not so. Section 1608(a)(3) requires that the service packet must be addressed and dispatched *to the foreign minister*; no substitution is permitted. Petitioner cannot seriously be arguing that process is successful only if the service packet is delivered to the addressee without the use of intermediaries: whether served at the embassy or the foreign ministry, the packet will ordinarily be accepted, and the receipt signed, by a mailroom employee. There is no reason that the involvement of an intermediary takes the transmission outside the statutory language as long as the "addressed and dispatched" requirement is met.

Petitioner further notes that Section 1608(b)(3) provides for service "if reasonably calculated to give actual notice." Br. 23. But no inference about Section 1608(a)(3) can be drawn from the inclusion of that language in Section 1608(b)(3); it constitutes an additional overarching requirement, applicable not just to service by mail but also service by other means (*e.g.*, "by order of the court"). 28 U.S.C. 1608(b)(3). While Section 1608(a)(3) does not contain that discrete requirement, it does require that the service packet be "dispatched" to the foreign minister: that is, that it be sent in a manner likely to reach the foreign minister promptly. See p. 34, *infra*.

3. Recognizing the problem it presents for its interpretation, petitioner attempts to explain away the inclu-

sion of a location for service in Section 1608(a)(4)—language that, under its interpretation, would otherwise be superfluous. Petitioner contends that the reference in that provision to the Secretary of State "in Washington, District of Columbia" was included in order to distinguish the United States Secretary of State from "a Secretary of State of an individual state." Br. 28. But that is no answer to the critical point that Congress knew how to include a location for service when it chose to do so (for whatever purpose). See pp. 22-23, *supra*.

Petitioner seemingly embraces that principle, acknowledging that "drawing inferences from silence is unwarranted when Congress expressly addressed [an] issue elsewhere in the FSIA." Br. 27. But petitioner proceeds to do just that, arguing that the inclusion of the Washington location in Section 1608(a)(4) "confirms that a [Section] 1608(a)(3) mailing, too, must be sent to the relevant capital city." Br. 28. That is exactly the wrong inference: Congress's silence in Section 1608(a)(3) on the very issue it addressed in Section 1608(a)(4) powerfully indicates that the two provisions should be read differently, not identically. See p. 22, *supra*.

In any event, petitioner's proffered explanation for Section 1608(a)(4) is implausible on its own terms. There can be no serious doubt that, in a statute about foreign relations, "*the* Secretary of State" in Section 1608(a)(4) (not to mention one associated with a "Director of Special Consular Services" and able to transmit materials through diplomatic channels), refers to the United States Secretary of State. 28 U.S.C. 1608(a)(4) (emphasis added). Nor does the location clause avoid any purported confusion, because the District of Columbia has a Secretary of State of its own. See District of Columbia, Office of the Secretary <tinyurl.com/dcsecretary> (last visited

Sept. 18, 2018). It is therefore clear that Congress's purpose in including a location for service was precisely what the plain language suggests: to specify where the Secretary should be served.[4]

4. Petitioner contends (Br. 25-26) that numerous courts of appeals have embraced its reading of Section 1608(a)(3). Petitioner greatly overstates its case. The vast majority of those decisions did not address the question presented, but instead rejected service that was plainly impermissible under Section 1608(a)(3). See *Barot* v. *Embassy of Zambia*, 785 F.3d 26, 28-29 (D.C. Cir. 2015) (service packet sent to the Zambian foreign ministry but addressed to the embassy of Zambia rather than the foreign minister); *Magness* v. *Russian Federation*, 247 F.3d 609, 613 (5th Cir.) (service materials sent to the Texas Secretary of State for forwarding to the foreign president and sent directly to the deputy culture minister in the foreign state's capital), cert. denied, 534 U.S. 892 (2001); *Transaero, Inc.* v. *La Fuerza Aerea Boliviana*, 30 F.3d 148, 153 (D.C. Cir. 1994) (service packets sent to the foreign state's ambassador, consul general, and first minister), cert. denied, 513 U.S. 1150 (1995); *Alberti* v. *Empresa Nicaraguense de La Carne*, 705 F.2d 250, 252-253 (7th Cir. 1983) (service packet addressed to the foreign state's ambassador rather than its foreign minister); *Autotech Technologies LP* v. *Integral Research & Development Corp.*, 499 F.3d 737, 748 (7th Cir. 2007) (service attempted

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[4] The government offers a different explanation for Section 1608(a)(4), arguing that it would be difficult to formulate a corresponding clause for Section 1608(a)(3) because it would have to address "locations in many countries." Br. 17. Not so: Congress could simply have added "at the ministry" or "in the foreign state's seat of government" to the end of Section 1608(a)(3). See p. 22, *supra*.

on the foreign state's ambassador), cert. denied, 552 U.S. 1231 (2008).[5]

To be sure, some of those decisions paraphrased Section 1608(a)(3) as requiring service to be directed to the foreign ministry. For example, the District of Columbia Circuit stated that "[S]ection 1608(a) mandates service of the Ministry of Foreign Affairs." *Transaero*, 30 F.3d at 154. But such loose descriptions in decisions that do not address the question presented signify little. Tellingly, in a subsequent case, the D.C. Circuit had no qualms in rejecting service where the packet was sent to a ministry of foreign affairs but not addressed to the foreign minister. See *Barot*, 785 F.3d at 28-29.

In fact, the Fourth Circuit's decision in *Kumar* is the sole decision to adopt petitioner's interpretation of Section 1608(a)(3), and even it did not do so based on the plain language of the provision. See 880 F.3d at 155. Instead, it concluded that, while "not strictly prohibited by the statutory language," the service at issue was impermissible because it was "in tension with Congress's objective" and inconsistent with the United States' obligations under the Vienna Convention. *Ibid.* The Fourth Circuit's reasoning was wrong on its own terms. See pp. 35-49, *infra*. But for present purposes, the key point is that the Fourth Circuit's decision provides no support for the textual arguments advanced by petitioner.

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[5] Oddly, the government also relies on *Gates*, *supra*, for the proposition that Syria did not dispute the propriety of service of process under Section 1608(a)(3) when the service packet was "address[ed] to the Syrian Ministry of Foreign Affairs." Br. 14. But the packet in that case was addressed to the "Minister of Foreign Affairs" at the Ministry of Foreign Affairs, thereby indisputably satisfying Section 1608(a)(3). See Dkt. 6-1, *Gates* v. *Syrian Arab Republic*, No. 06-1500 (D.D.C.).

5. Petitioner makes a series of policy arguments in support of its interpretation and against the plain-text interpretation. All of those arguments lack merit.

a. Petitioner contends (Br. 45-47) that permitting the service packet to be mailed to the foreign minister at the foreign state's embassy would place an improper burden on the embassy. But the embassy—which is not itself the addressee—incurs no obligations as to the service packet simply because it is delivered to the embassy's address. If a foreign state does not wish to use its diplomatic pouch (or other means) to transmit a service packet to the foreign minister, it need not do so. The foreign state can decline to sign for a package from a clerk of court addressed to the foreign minister, just as it presumably would for any package addressed to an individual with which the embassy lacks a direct line of communication (such as a private citizen). For that matter, the foreign state can refuse to sign for such a package even if the service packet is mailed to the foreign minister at the foreign ministry, and even if it does so precisely in order to avoid service. If the foreign state does not sign, service under Section 1608(a)(3) will fail, and a plaintiff will have to seek to effect service through diplomatic channels under Section 1608(a)(4) instead.[6]

Indeed, that appears to be what petitioner did in *Kumar* when it was re-served at the foreign ministry in Khartoum in precisely the manner it requests here: petitioner did not sign the return receipts, with the result that service was not perfected under Section 1608(a)(3). See

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[6] For similar reasons, embassy personnel are not functioning as "de facto agents" for service of process, as petitioner and the government suggest (Pet. Br. 42; U.S. Br. 27). Absent the embassy's agreement to transmit the materials to the foreign minister as an addressee that can be found at its address, service at that address is not effective. See 28 U.S.C. 1608(c)(2).

D. Ct. Dkt. 213, at 3 n.2, *Kumar*, *supra*. While petitioner was within its rights to do so, its refusal to accept service utterly belies its claim that it is seeking "an opportunity to defend itself" on the merits, Br. 6, and confirms that it is instead seeking to delay relief for the *Cole* victims through any available means.

By contrast, in this case, the clerk certified that petitioner had signed for the service packet, thereby implicitly agreeing to transmit the packet to the addressee. See p. 9, *supra*. Petitioner did not contend that its action in signing for the packet was an oversight, nor did it seek to rescind its signature by returning the packet or otherwise indicating that it did not wish to accept service. Instead, it allowed the litigation to proceed for years, challenging service only after judgment had been entered and the turnover orders had been issued. Under those circumstances, it is dimly ironic for petitioner to cite the burden on embassies as a justification for rejecting the plain-text interpretation of Section 1608(a)(3).

b. Petitioner further contends (Br. 30) that, without its proposed location requirement, a service packet could be mailed to other offices of the foreign state, such as a tourism office. But petitioner disregards the limitation embodied in the text of Section 1608(a)(3) itself: that the service packet must be "dispatched" to the foreign minister, *i.e.*, sent in a manner likely to reach the foreign minister promptly. To satisfy that limitation, the service packet would have to be sent to a location that is likely to have a direct line of communication to the foreign minister. The foreign ministry and an embassy plainly would qualify; a tourism office plainly would not.

c. Finally, petitioner emphasizes that Section 1608(a)(3) must be followed "meticulously and without de[vi]ation." Br. 24. True enough, but that is all the more

reason to read the statute by its terms, not to add a requirement the statute does not expressly contain. It would be grossly unfair to hold plaintiffs to rigid compliance with a requirement that is not evident on the face of the statute.

This case amply illustrates the point. Respondents, victims of a horrific terrorist attack and their spouses, followed Section 1608(a)(3) to the letter in serving petitioner—at a time when Sudan was wracked with conflict and the ability to effect service directly in Sudan was at best uncertain. No court, much less this one, had then held that Section 1608(a)(3) contained the unstated requirement that the service packet be sent to the address of the foreign ministry. After respondents sent the service packet to the foreign minister at the Sudanese embassy, the embassy accepted service. Respondents established their entitlement to relief more than six years ago, and, after additional proceedings, obtained turnover orders giving them access to some of petitioner's assets. It would be the height of unfairness to throw out respondents' judgment now, forcing them to start from square one, simply because they failed to intuit and then comply with an additional, unstated requirement.

C. The Plain-Text Interpretation Of Section 1608(a)(3) Is Consistent With The Vienna Convention On Diplomatic Relations

Acknowledging that the text of Section 1608(a)(3) is at most ambiguous as to their asserted location requirement, petitioner and the government heavily rely on the Vienna Convention on Diplomatic Relations to support their proposed interpretation. See Pet. Br. 31-49; U.S. Br. 20-29. Because Section 1608(a)(3) is unambiguous, the Court need not consider the Vienna Convention at all. In any event, an interpretation of Section 1608(a)(3) that permits the mailing of a service packet to a foreign minister at the

foreign state's embassy is entirely consistent with the Convention. As both the commission that drafted the Vienna Convention and the Supreme Court of the United Kingdom have recognized, the Convention does not place any limit on the service of process by mail. Petitioner's and the government's contrary arguments are riddled with errors.

1. At the outset, petitioner and the government argue (Pet. Br. 33-34; U.S. Br. 21) that Section 1608(a)(3) must be interpreted consistently with the Vienna Convention under the canon of construction that statutes should not be interpreted to conflict with treaties. That is itself incorrect. Properly understood, that canon applies only to ambiguous statutes. See, *e.g.*, *Whitney* v. *Robertson*, 124 U.S. 190, 194-195 (1888); *Fund for Animals, Inc.* v. *Kempthorne*, 472 F.3d 872, 879 (D.C. Cir. 2006). Because the text of Section 1608(a)(3) is unambiguous, see pp. 18-24, *supra*, the canon "give[s] way" and has no application here. *Cloer*, 569 U.S. at 381. If Section 1608(a)(3) were inconsistent with the Convention (and it is not), the later-in-time statute would "render[] the treaty null." *Breard* v. *Greene*, 523 U.S. 371, 376 (1998) (per curiam) (citation omitted).

Petitioner, but not the government, suggests (Br. 34-35) that the FSIA incorporates the requirements of the Vienna Convention because one of its provisions states that it is "[s]ubject to existing international agreements." 28 U.S.C. 1604. But the cited provision addresses only subject-matter jurisdiction; nothing in that provision suggests that the *rest* of the FSIA is "[s]ubject to existing international agreements." In fact, that clause also appears in Section 1609 (governing immunity from attachment of property), but it conspicuously does not appear in the provision at issue here, Section 1608. The inclusion of that clause in Sections 1604 and 1609 strongly suggests that its

omission in Section 1608 was intentional. See, *e.g.*, *Sigmon Coal*, 534 U.S. at 452.[7]

2. In any event, the plain-text interpretation of Section 1608(a)(3) is entirely consistent with the Vienna Convention. Petitioner and the government contend that the mailing of a service packet to a foreign minister at the foreign state's embassy violates Article 22, Section 1, of the Vienna Convention. They further assert that the drafting history, interpretation by other signatory nations, prevailing understanding among commentators, and longstanding Executive Branch interpretation all support that view. Petitioner and the government are wrong in every respect. The Convention does not limit service of process by mail.

a. The starting point in interpreting the Vienna Convention is its text. See *Water Splash, Inc.* v. *Menon*, 137 S. Ct. 1504, 1508 (2017). Nothing in the Convention's text speaks to the service of process or otherwise suggests that mailing a service packet to an embassy is prohibited.

In full, Article 22, Section 1, of the Vienna Convention reads as follows: "The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission." Article 22, Section 1, thus links the inviolability of diplomatic premises with protection from physical intrusion by agents of the receiving state. But no such intrusion by a state agent occurs when a service packet (or any other document) is delivered through the mail. See 7 Marjorie M. Whiteman, *Digest of International Law* § 36, at 376 (1970) (Whiteman) (quoting an official State Depart-

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[7] In fact, in an earlier version of the bill, Congress included "[s]ubject to existing and future international agreements" in Section 1608, but it removed the phrase before the FSIA was enacted. H.R. 11315, 94th Cong. 48 (1975).

ment statement that, under Article 22, no "specific invitation" is required "for the milkman, the postman, [or] the garbage man").

That interpretation accords with both the plain language and common sense. Mailing is not an act of trespass. As one court has explained, "[a]s a matter of ordinary language, it is difficult to see why posting documents" to diplomatic premises "by way of service of proceedings * * * infringes the inviolability" of those premises, because it "certainly does not involve entry into the [premises] by agents of the receiving [s]tate." *Reyes* v. *Al-Malki*, [2015] EWCA (Civ) 32 [86] (Lord Dyson, Master of the Rolls), aff'd, [2017] UKSC 61. Put differently, "[t]he inviolability of the foreign missions does not bar them from receiving tons of mail through the national postal services every day." Rolf Einar Fife & Kristian Jervell, *Elements of Nordic Practice 2000: Norway*, 70 Nordic J. Int'l L. 531, 553 (2001) (Fife & Jervell). If it were otherwise and service of process by mail at a foreign embassy were impermissible, it is hard to see why service of process by mail at a foreign ministry would be permissible either.

Nor does the delivery of service documents impermissibly interfere with the embassy staff's performance of their duties, as petitioner suggests (Br. 36). See *Reyes* v. *Al Malki*, [2017] UKSC 61 [16]; *Renchard* v. *Humphreys & Harding, Inc.*, 59 F.R.D. 530, 532 (D.D.C. 1973). That is particularly true under Section 1608(a)(3), because the delivery of a service packet by mail has no effect unless and until the embassy chooses to sign for it and thereby undertakes the (modest) obligation of transmitting it to the foreign minister.

b. While the interpretation of a treaty begins with the text, this Court has considered the drafting history as an "aid[] to its interpretation." *Medellin* v. *Texas*, 552 U.S.

491, 506-507 (2008) (citation omitted). Petitioner and the government urge the Court to do the same here. See Pet. Br. 38-39; U.S. Br. 23. Incredibly, however, both petitioner and the government primarily rely on an obsolete and superseded report. The Convention's full drafting history confirms what its plain language indicates: Article 22 does not prohibit mailing a service packet to an embassy.

The articles that became the Convention were drafted by members of the United Nations' International Law Commission (ILC). Petitioner and the government rely on the ILC's 1957 report, adopted at its ninth session, which contained draft articles and corresponding commentary. See Pet. Br. 38-39; U.S. Br. 23. In particular, petitioner and the government quote language in the 1957 commentary stating that, under proposed Article 22 (then numbered Article 16), "no writ shall be served within the premises of the mission." Pet. Br. 38; U.S. Br. 23 (quoting *Report of the International Law Commission Covering the Work of Its Ninth Session, 23 April-28 June 1957*, 12 U.N. GAOR Supp. No. 9, at 6, U.N. Doc. A/3623 (1957), reprinted in [1957] 2 Y.B. Int'l L. Comm'n 131, 137, U.N. Doc. A/CN.4/SER.A/1957/Add.1 (*ILC Ninth Session Report*)). Petitioner also emphasizes the statement in the 1957 commentary that all writs constituting service of process "must be delivered *through the Ministry for Foreign Affairs of the receiving [s]tate.*" Br. 39 (quoting *ILC Ninth Session Report* 137).[8]

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[8] In emphasizing that language, petitioner appears to confuse the foreign ministry of the "receiving [s]tate" (which, in the parlance of the Vienna Convention, is the state that "receives" the diplomatic mission, here the United States) with the foreign ministry of the sending state (which is the state that is subject to service). See Br. 39. If Article 22 required all service to be delivered through the United

However, the ILC's work did not end in 1957. At its tenth session, in 1958, the ILC adopted the final set of draft articles that ultimately became the Vienna Convention. See G.A. Res. 1450 (XIV) (Dec. 7, 1959). Like the 1957 commentary, the 1958 commentary acknowledged that "no writ may be served within the premises of the mission" under proposed Article 22 (then renumbered Article 20). *Report of the International Law Commission Covering the Work of Its Tenth Session, 28 April-4 July 1958*, 13 U.N. GAOR Supp. No. 9, at 17, U.N. Doc. A/3859 (1958), reprinted in [1958] 2 Y.B. Int'l L. Comm'n 78, 95, U.N. Doc. A/CN.4/SER.A/1958/Add.1 (*ILC Tenth Session Report*). But the revised commentary deleted the statement that certain judicial writs "must be delivered through the Ministry for Foreign Affairs of the receiving [s]tate." Compare *ILC Ninth Session Report* 137 with *ILC Tenth Session Report* 95. Critically for present purposes, the revised commentary also clarified that *"[t]here is nothing [in proposed Article 22] to prevent service through the post if it can be effected in that way." ILC Tenth Session Report* 95 (emphasis added).

The ILC's reporter, Sir Gerald Fitzmaurice, later explained that the 1957 commentary was clarified because "[t]here was in fact no reason why judicial notices should not be sent through the post." *Summary Records of the Tenth Session of the International Law Commission*, [1958] 1 Y.B. Int'l L. Comm'n 131, U.N. Doc. A/CN.4/SER.A/1958 (*Tenth Session Summary Records*). In fact, that had been the prevailing understanding of the drafters at the ninth session itself. See *ibid.*; Eileen Denza, *Diplomatic Law* 124 (4th ed. 2016) (Denza). The purpose of the statement in the 1957 commentary was simply to

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States Department of State, petitioner's own interpretation of Section 1608(a)(3) would also be inconsistent with the Vienna Convention.

"state that certain types of writ"—those that required personal service to be effective—"could not be served on mission premises." *Tenth Session Summary Records* 131 (statement of Mr. Fitzmaurice).

Remarkably, petitioner and the government seem either to be unaware of the relevant section of the final 1958 commentary or, even worse, to ignore it entirely.[9] But regardless of the explanation, their reliance on the obsolete and superseded 1957 commentary is patently improper.

Beyond the 1957 commentary, petitioner, but not the government, relies on a one-off comment attributed to a member of the Japanese delegation to the United Nations Conference on Diplomatic Intercourse and Immunities (Vienna Conference), where the draft articles that became the Vienna Convention were debated in 1961. See Br. 39. At that conference, the Japanese delegation introduced and then withdrew an amendment prohibiting writs "served *by a process server* within the premises of the mission," in order to make clear that service by post (unlike service by process server) was *permissible*. U.N. Conference on Diplomatic Intercourse and Immunities, *Annexes, Final Act, Vienna Convention on Diplomatic Relations, Optional Protocols, Resolutions*, U.N. Doc. A/CONF.20/14/Add.1, at 22 (Vol. II) (1962) (emphasis added). In withdrawing the amendment, the Japanese representative apparently expressed his belief that "it was the unanimous interpretation of the [Committee of the Whole] that no writ could be served, even by post, within the premises of a diplomatic mission." United Na-

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[9] Petitioner appears to have been aware at least of the existence of the 1958 commentary, because it cites it elsewhere in its brief for an unrelated proposition. See Br. 46. Because petitioner filed its brief before the government's, the government was on notice of the existence of the 1958 commentary.

tions Conference on Diplomatic Intercourse and Immunities, *Summary Records of Plenary Meetings and Meetings of the Committee of the Whole* 141, U.N. Doc. A.CONF.20/14 (Vol. I) (1962) (*U.N. Conference Summary Records*).

That statement warrants little weight, because it has no support in the underlying conference records. As a member of the American delegation who attended the conference explained shortly after its conclusion, "[w]hether or not there was in fact * * * a consensus, the [c]onference records do not reflect it." Ernest L. Kerley, *Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities*, 56 Am. J. Int'l L. 88, 102 (1962). In fact, conference records affirmatively suggest that there was no consensus against service by post; if anything, they suggest a near-consensus in the opposite direction. See, *e.g.*, *U.N. Conference Summary Records* 137-140 (statements of Soviet, Norwegian, Spanish, Ghanaian, and Turkish representatives indicating support of service by post on diplomatic premises, with only Argentinian representative expressing opposition). Accordingly, after canvassing the conference records, at least one court has discounted the Japanese representative's statement, noting that "little attention was paid to the Japanese proposal or the basis on which it was withdrawn." *Reyes*, [2015] EWCA (Civ) 32 [90].

In any event, the Japanese representative's statement makes little sense even on its own terms. The statement was inconsistent both with Japan's proposed amendment (which, again, sought to *allow* service by mail) and with another Japanese representative's earlier statement that Japan's standard service procedure was to "notify diplomatic agents through the post" and that disallowing service by mail would put Japan "in some difficulty." *Tenth*

Session Summary Records 131 (statement of Mr. Yokota). Given those inconsistences and the absence of support in the conference records, the isolated statement of the Japanese representative cannot overcome the ILC's final commentary, which makes clear that the drafters of the Convention considered whether Article 22 prohibited service of process by mail and concluded that it did not. See *Reyes*, [2015] EWCA (Civ) 32 [89-91], [94] (reaching the same conclusion).

c. Compounding their omission of the key drafting history, petitioner and the government seem either to be unaware of, or to ignore entirely, a recent decision of the Supreme Court of the United Kingdom that addresses the question whether the Vienna Convention prohibits the service of process by mail at diplomatic premises. See *Reyes* v. *Al Malki*, [2017] UKSC 61. That decision—the only one we have found on the question from a court of last resort of a signatory nation[10]—holds that the Vienna Convention does *not* prohibit the service of process by mail, even when a default judgment may result from the failure to respond. See *id.* at [16]. As a "[d]ecision[] of the court[] of [an]other Convention signator[y]," *El Al Israel Airlines Ltd.* v. *Tsui Yuan Tseng*, 525 U.S. 155, 175 (1999), that decision is entitled to "considerable weight," *Air France* v. *Saks*, 470 U.S. 392, 404 (1985) (citation omitted).

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[10] The decisions of other courts of signatory nations cited by amici law professors (Br. 11-12), only one of which was from a court of last resort, either involved personal service on a mission, see *Sebina* v. *South African High Commission*, [2010] 3 BLR 723 IC (Botswana Indus. Ct.); *Village Holdings Sdn. Bhd.* v. *Her Majesty the Queen in Right of Canada*, [1988] 2 MLJ 656 (Malaysia H.C.); did not address the Vienna Convention at all, see *Kuwait Airways Corp.* v. *Iraqi Airways Co.*, [1995] 1 WLR 1147 (U.K. H.L.); or mentioned the Convention only in dicta, see *Sistem Mühendislik Insaat Sanayi Ve Ticaret Anomic Sirketi* v. *Kyrgyz Republic*, 2015 ONCA 447 (Can. Ont. C.A.).

In *Reyes*, a Philippine national sued her employer, a Saudi diplomat, and served process on him by mail at his residence. [2017] UKSC 61 [1]. One question in the case was whether that mode of service impinged upon the inviolability of the diplomatic residence (which, under Article 30 of the Vienna Convention, "enjoy[s] the same inviolability and protection as the premises of the mission" under Article 22). *Id.* at [8], [13], [16] (citation omitted); see *Reyes*, [2015] EWCA (Civ) 32 [86].

The Supreme Court of the United Kingdom held that the Vienna Convention did not prohibit the service of process by mail at diplomatic premises. Writing for a unanimous court on the service question, Lord Sumption concluded:

> Premises are violated [within the meaning of the Vienna Convention] if an agent of the state enters them without consent or impedes access to or from the premises or normal use of them * * *. The delivery by post of a claim form does not do any of these things. It simply serves to give notice to the defendant that proceedings have been brought against him, so that he can defend his interests, for example by raising his immunity if he has any.

Reyes, [2017] UKSC 61 [16]. Expanding on that conclusion, Lord Sumption explained:

> The mere conveying of information, however unwelcome, by post to the defendant, is not a violation of the premises to which the letter is delivered. It is not a trespass. It does not affront his dignity or affect his right to enter or leave or use [the premises]. It does of course start time running for subsequent procedural steps and may lead to a default if no action is taken. But so far as this is objectionable, it can only

> be because there is a relevant immunity from jurisdiction. It is not because the proceedings were brought to the diplomatic agent's attention by post.

Ibid. That reasoning applies with full force here. To the extent the interpretation of the Vienna Convention by other signatory nations is relevant, the decision of this Court's sister court in the United Kingdom is surely the most significant data point.[11]

d. Just as petitioner and the government omit the key drafting history and the key decisional authority, they disregard entire swaths of academic commentary on the Vienna Convention. While it is true that some commentators share petitioner's view (albeit based on superficial analysis), many other commentators, including most contemporaneous ones, have understood Article 22 not to preclude the service of process by mail. See, *e.g.*, Fife & Jervell 553; Ferdinand Mesch, *Jurisdictional Immunities of Foreign States*, 23 DePaul L. Rev. 1225, 1240 (1974); Richard Crawford Pugh & Joseph McLaughlin, *Jurisdictional Immunities of Foreign States*, 41 N.Y.U. L. Rev. 25, 31-32 (1966). In particular, two former State Department attorneys have taken the position that "[n]othing in the Vienna Convention or in customary international law prevents the use of the mail to notify a foreign state that it is required to answer a summons and complaint." Andreas F. Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U. L. Rev. 901, 934 (1969); see William L.

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[11] Petitioner relies on the views of Austria, Libya, Saudi Arabia, and the United Arab Emirates. See Br. 46-47. The positions of that select group of nations are hardly surprising, because each faces the threat of significant litigation in the United States for involvement either in the Holocaust or in more recent acts of terrorism. See, *e.g.*, *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004); *In re Terrorist Attacks on September 11, 2001*, MDL No. 03-1570 (S.D.N.Y.).

Griffin, *Adjective Law and Practice in Suits Against Foreign Governments*, 36 Temp. L.Q. 1, 13 (1962).

The "leading treatise" on which petitioner and the government rely (U.S. Br. 22; see Pet. Br. 37-38) observes that, despite the ILC's "original understanding," the view the Vienna Convention prohibits service of process by mail at diplomatic premises "seems to have become generally accepted *in practice*"; even as to that limited conclusion, however, it acknowledges that any consensus that "appeared to be emerging" no longer exists in light of the intermediate court's decision in *Reyes*. Denza 124, 126 (emphasis added). What is more, both that treatise and all of the other commentary on which petitioner and the government rely predate the decision of the United Kingdom Supreme Court in *Reyes*, which affirmed the intermediate court and unequivocally held that the Vienna Convention does not prohibit service of process by mail at diplomatic premises. The more considered academic commentary supports that position, not petitioner's.

e. Finally with regard to the Vienna Convention, petitioner and the government contend that the government's interpretation of the Vienna Convention is entitled to "great weight." Pet. Br. 13, 42, 55; U.S. Br. 22, 24. On that, too, they are mistaken.

i. As a preliminary matter, it bears remembering that the question presented here ultimately involves the interpretation of a federal statute, the FSIA—a question on which the government is not entitled to deference. This is not a case, like the cases cited by petitioner and the government, in which the question presented itself involves the interpretation of a treaty. See, *e.g.*, *Water Splash*, 137 S. Ct. at 1509; *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 180 (1982); *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961). Nor is this a case involving the

interpretation of an implementing statute that incorporates or mirrors the terms of a treaty. See, *e.g.*, *Abbott* v. *Abbott*, 560 U.S. 1, 9, 15 (2010) (affording deference in a case involving a statute that required a court to "decide the case in accordance with [the underlying treaty]" (citation omitted)); but see *Bond* v. *United States*, 134 S. Ct. 2077, 2087-2088, 2091-2092 (2014) (affording no deference).

Here, the parties are relying on the Vienna Convention only indirectly, to support their competing interpretations of the FSIA—a context in which this Court has previously refused to afford deference. See *Permanent Mission of India to United Nations* v. *City of New York*, 551 U.S. 193, 201-202 (2007). That makes good sense, because the ultimate question here is how (if at all) to reconcile the FSIA with the Vienna Convention. Cf. *Epic Systems Corp.* v. *Lewis*, 138 S. Ct. 1612, 1629 (2018) (refusing to defer to an agency interpretation in a case in which the agency "has sought to interpret [a] statute in a way that limits the work of a second statute," on the ground that "the reconciliation of distinct statutory regimes is a matter for the courts" (internal quotation marks and citation omitted)).

ii. Even if the government were entitled to deference in this context, it would be unwarranted here. The government's interpretation of the Vienna Convention would carry weight only insofar as it furthers the Court's understanding of the Convention's meaning. See *BG Group, PLC* v. *Republic of Argentina*, 572 U.S. 25, 37-38 (2014); *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 630 (2006). The government's interpretation here does not do so.

The government contends that it has "consistently adhered" to the view that Article 22 precludes the service of process by mail. Br. 21-22. That is wrong. The State Department appears to have first taken that position in 1974,

stating that the view that Article 22 precludes the service of process by mail had "come to [its] attention" and, in support of that view, relying on the ILC conference records reflecting the statement of the Japanese representative. See Department of State, *Service of Legal Process by Mail on Foreign Governments in the United States*, 71 Dep't St. Bull., No. 1840, at 459 (Sept. 30, 1974) (citing *U.N. Conference Summary Records* 141).

Before 1974, however, the State Department's view was just the opposite. In 1973, in a section-by-section analysis of the draft bill that later became the FSIA, the State Department stated that "it was generally accepted during the drafting of the Vienna Convention on Diplomatic Relations that this prohibition [on personal service of process on an ambassador] does not apply to service effected by mail." 122 Cong. Rec. 2120; see Whiteman 375 (quoting, in a 1970 State Department publication, the ILC Tenth Session Report that "[t]here is nothing to prevent service through the post if it can be effected in that way" (citation omitted)); cf. Denza 124 (suggesting that, before the 1970s, "[t]he United States had consistently favoured permitting service by post"). Given that view, it is hard to credit government's contrary, *post hoc* view, absent a more compelling explanation for the government's change of heart. See *The Diamond Rings*, 183 U.S. 176, 180 (1901).[12]

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[12] The government also points to a 1964 letter. Br. 21-22. But the passage the government cites does not address either Article 22 or service by mail, instead explaining the State Department's view that American diplomatic officers should not be required to serve summonses on foreign embassies. See Letter from Leonard C. Meeker, Acting Legal Adviser, Department of State, to John W. Douglas, Assistant Attorney General, Department of Justice 9 (Aug. 10, 1964). As to Article 22, the letter states only that transmitting a summons should not occur "by *personal* service within the premises of the embassy of the sending state." *Ibid.* (emphasis added).

In addition, the government's current position is seemingly inconsistent with its own regulations. The implementing regulation for 28 U.S.C. 1608(a)(4), which directs the Secretary of State to transmit the service documents to the foreign state through diplomatic channels, expressly allows for delivery *to a foreign state's embassy* in the United States. See 22 C.F.R. 93.1(c)(2) (authorizing such delivery "[i]f the foreign state so requests or if otherwise appropriate"). If service of process by mail at the embassy were a violation of Article 22, that approach, which involves a delivery directly to the embassy under cover of a diplomatic note, presumably would be too.

In light of the inconsistency in the government's positions and the apparent inconsistency with its own regulations, the government's current position is entitled to little weight. See *Perkins* v. *Elg*, 307 U.S. 325, 328, 337-342 (1939). And that is particularly true because the government's current position is based on a systematic misunderstanding of the drafting history and other sources interpreting the Vienna Convention. See pp. 38-46, *supra*. Respondents' interpretation, by contrast, is supported by the ILC itself, nearly every ILC representative to have addressed the issue, most contemporaneous commentators, and the Supreme Court of the United Kingdom. See *ibid.* Even if the text of Section 1608(a)(3) were ambiguous—and it is not—respondents' interpretation of that provision is entirely consistent with the Convention.

D. The Plain-Text Interpretation of Section 1608(a)(3) Is Consistent With The Legislative History

Petitioner and the government also rely on the legislative history of the FSIA. See Pet. Br. 49-54; U.S. Br. 29-32. Because the plain text of Section 1608(a)(3) resolves the question presented, "that is * * * where the inquiry should end." *Puerto Rico* v. *Franklin California Tax-*

Free Trust, 136 S. Ct. 1938, 1946 (2016) (internal quotation marks and citation omitted). To the extent the Court wishes to consider it, however, the legislative history sheds little light on the question in this case.

Petitioner and the government cite the House Judiciary Committee's report, which suggests that "[s]ervice on an embassy by mail [is] precluded under this bill" in order to "avoid questions of inconsistency with [Article 22(1)] of the Vienna Convention." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 26 (1976). But it is clear from context that the report was addressing the discrete issue of service directed to an *ambassador*: specifically, a mailing that would make the ambassador, not the foreign minister, the ultimate recipient of service. The version of the FSIA as introduced in 1973 permitted sending a service packet "to be addressed and dispatched * * * *to the ambassador or chief of mission* of the foreign state"; it did not mention embassies at all. S. 566, 93d Cong. (1973) (emphasis added); H.R. Rep. No. 1487, *supra*, at 26.

In enacting the FSIA in 1976, Congress reworked that provision, replacing the ambassador with the foreign minister. 28 U.S.C. 1608(a)(3). Thus, when the House Report refers to service "on an embassy" being prohibited under the 1976 bill (as contrasted with the earlier 1973 bill), it was seemingly referring to mailings sent *to ambassadors*, not mailings sent to others at embassies. Cf. *Hellenic Lines, Ltd.* v. *Moore*, 345 F.2d 978, 983 & n.5 (D.C. Cir. 1965) (Washington, J., concurring) (recognizing that service on an ambassador by mail avoids some of the problems inherent in personal service, but noting other problems with mail addressed to the ambassador).

Always the best indicator of congressional intent, the statutory text makes clear that Congress did not do what petitioner and the government say it supposedly in-

tended: prohibit the service of process by mail at an embassy. The text of Section 1608(a)(3) contains no limitation on the location for the service of process, and the legislative history cannot (and does not) supply such a limitation.

E. The Government Has No Legitimate Interest In The Adoption Of Petitioner's Interpretation

Finally, the government contends (Br. 26) that interpreting Section 1608(a)(3) to allow service packets to be sent to embassy addresses would jeopardize the longstanding United States policy of refusing to recognize the validity of service, whether by mail or by personal delivery, at its embassies abroad. The government suggests (Br. 25-26) that, if the Court adopts that interpretation, it may be forced—or at least pressured—to accept service at its embassies.

The government's efforts to generate a justification for its position are unavailing. Under the government's logic, the FSIA should be interpreted to allow a litigant to serve a foreign state only by a form of service that the United States accepts on itself. But the government ignores the fact that it does not accept process *in any manner* contemplated by Section 1608(a)(3)—whether at an embassy or even at the State Department itself. The government takes the position that "service on the U.S. government is *only* proper when transmitted" in one of two ways: (1) "through diplomatic channels," *i.e.*, by the foreign ministry of the foreign country to the State Department, or (2) "through Article 5 of the Hague Service Convention by delivery to the U.S. Central Authority," referring to the Department of Justice's Office of International Judicial Assistance. Department of Justice, *Service of Process on the United States Government* 2 (Nov. 4, 2016) <tinyurl.com/usgservice>. The government's argument

here implies that no service would ever be permissible under Section 1608(a)(3)—an untenable result.

For its part, petitioner emphasizes the government's interest in reciprocal treatment under customary international law. See Br. 56. But as the government has previously explained, "generally accepted international practice * * * does not * * * provide for the more liberal means of service in Section 1608(a)(3)." U.S. Br. at 23, *Magness*, 247 F.3d 609 (5th Cir. 2001) (No. 00-20136). According to the government, as a matter of customary international law, the sole method for serving a ministry of foreign affairs is through diplomatic channels. See *id.* at 24. Whenever service is effected in any manner contemplated by Section 1608(a)(3), therefore, it goes further than customary international law. Yet the United States has not sought to alter the provision of the FSIA permitting service of process on a foreign minister by mail, nor has it yielded to any supposed pressure to accept such service of process itself.

In short, the government has no legitimate institutional interest in the outcome of the question presented. See U.S. Br. 1. Absent such an interest, one might well wonder why the United States is supporting Sudan in this case. In an unusual apologia at the beginning of its brief, the government states that it "deeply sympathizes with the extraordinary injuries suffered by respondents." Br. 2. But if there's one thing our veterans know, it's that actions speak louder than words. Particularly given this Administration's solicitude for veterans, its decision to side with a state sponsor of terrorism, against men and women who are seeking to recover for grievous injuries suffered in the service of our country, is inexplicable and distressing.

No matter. The plain language of the FSIA disposes of this case. Respondents correctly served petitioner

when they caused the service packet to be mailed to petitioner's foreign minister at the Sudanese embassy in the United States and petitioner accepted service. The judgment in respondents' favor is therefore valid, and the turnover orders are likewise enforceable. Respondents should be allowed to obtain compensation for their losses without further delay.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 2018

No. 16-1094

IN THE

Supreme Court of the United States

REPUBLIC OF SUDAN,

Petitioner,

v.

RICK HARRISON, *et al.*,

Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETTTIONER

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REPLY BRIEF FOR PETITIONER

Plaintiffs maintain that §1608(a)(3)'s requirement of a mailing "addressed and dispatched . . . to the head of the ministry of foreign affairs" does not require the mailing to contain the address of the minister or to be sent there. Only through such a strained interpretation of §1608(a)(3) can Plaintiffs justify having process mailed to Sudan's Embassy in Washington, rather than to the address of the foreign minister in Khartoum.

And having process — and specifically the jurisdiction-asserting summons — mailed to Sudan's Embassy was a particularly indefensible choice given that the Vienna Convention makes diplomatic missions categorically "inviolable" from all assertions of sovereignty as well as all other indignities and interferences. Plaintiffs, who until now have consistently conceded that the Convention prohibits all forms of service "on" an embassy (by mail or otherwise), now suddenly maintain that the Convention does *not* in fact prohibit service on the embassy by mail. Pls.' Br. 17, 37-38. But this belated argument is based on a misreading of the Convention's text and negotiating history; in fact, that history shows that allowing service by mail on an embassy was an idea entertained by the negotiators but ultimately rejected, along with all other proposed exceptions to the "inviolability" of diplomatic missions.

Furthermore, Plaintiffs cannot seriously dispute that the FSIA's legislative history shows that Congress purposefully decided to foreclose service by mail on embassies precisely "so as to avoid questions

of inconsistency with section 1 of article 22 of the Vienna Convention." H.R. Rep. No. 94-1487, at 26 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6625. Congress reached this decision because "the drafters of the Vienna Convention had construed Article 22 as prohibiting the service of any process or writ, 'even by post, within the premises of a diplomatic mission.'" 122 Cong. Rec. 17,469 (1976).

As a diversion from their weak arguments on the merits, Plaintiffs undertake to frame the issue before the Court as one relating to the FSIA's terrorism exception. Amici supporting Plaintiffs even argue that forbidding service by mail through an embassy would be "undermining an important weapon in the war on terror." *E.g.*, Counterterrorism Amicus Br. 5. Such concerns are not merely overblown, but utterly baseless. The issue before this Court relates to the proper method of service of process under §1608(a)(3) in *any* action against a foreign sovereign, not just actions under the FSIA's terrorism exception. Indeed, the issue more commonly arises in actions arising under other FSIA exceptions to immunity. *See, e.g.*, *Barot*, 785 F.3d at 28 (arising under commercial-activities exception). Requiring faithful adherence to the requirements of §1608(a)(3) will in no way undermine the terrorism exception or any other FSIA exception to immunity, particularly because service is *always* possible through diplomatic channels under §1608(a)(4). Lastly, while Plaintiffs are undeniably sympathetic, their status as victims of terrorism cannot justify bending a statutory rule of general application.

ARGUMENT

I. The Text Of §1608(a)(3) Is Naturally Read To Require That Process Be Mailed To The Head Of The Ministry Of Foreign Affairs In The Foreign State

Plaintiffs insist that §1608(a)(3) "is silent as to the location *where* the service packet should be sent" (Pls.' Br. 22), but Plaintiffs are mistaken. A requirement that a mailing be "addressed and dispatched . . . to" a particular person is naturally read as requiring the mailing be inscribed with the person's address and sent there.

Contrary to Plaintiffs' suggestion (Pls.' Br. 19), dictionary definitions confirm this point. The current version of the Oxford Dictionary of English specifically defines the verb "address" in the context of a mailing: "write the name and address of the intended recipient on (an envelope, letter, or parcel)." *Address, v.*, Oxford Dictionary of English 19 (3d ed. 2010). Plaintiffs' own handpicked definitions are not to the contrary. Pls.' Br. 19 (including "to put the directions for delivery on" (citation omitted)). Notably, the definition Plaintiffs provide from the Oxford English Dictionary 105 (1st ed. 1933) is incomplete, omitting these very next words: "*To address a letter* to one: To write and send it; in modern usage also, *techn.* to write on the outside the name and residence of the person to whom it is addressed, to 'direct' it."

Ordinary usage is the same. When holiday cards or business letters are being prepared for mailing, they are ordinarily not considered "addressed" until

they bear not only the intended recipient's name but also his or her address. While the word "addressed" may have varied meanings in other contexts, in the context of mailing an item, the item is not "addressed" unless it bears the postal address as well as the name.

As for "dispatch," Plaintiffs acknowledge that the word denotes sending in an expeditious manner. Pls.' Br. 19. The most expeditious manner of delivery, of course, is directly to the location of the intended recipient, rather than to an intermediate location for forwarding. Thus, §1608(a)(3)'s use of "dispatched" only reinforces that the mailing must be sent to the minister's address. Indeed, under Plaintiffs' construction of §1608(a)(3), the word "addressed" appears to be superfluous, as any mailing that is "dispatched" (sent expeditiously) to a person presumably would contain the person's name. *See Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) ("[C]ourts must give effect, if possible, to every clause and word of a statute." (internal quotation marks omitted)).

If Plaintiffs' construction of §1608(a)(3) were sound, the service package could properly be mailed to a variety of locations, not just the foreign state's embassy in the United States. If the foreign state's U.S. embassy is "expeditious" enough, then any other of the foreign state's scores of embassies around the world ought to be "expeditious" enough, too. They all "serve[] as a component and extension of the foreign ministry, with a direct line of reporting and communication to the foreign minister," as Plaintiffs assert. Pls.' Br. 20.

Indeed, Plaintiffs at one point seem to acknowledge the implications of their construction of §1608(a)(3): "As long as the packet is directed to the correct individual and sent in an expeditious manner, Congress was agnostic about the location where the packet is sent." Pls.' Br. 23. Perhaps recognizing the implausibility of this position, Plaintiffs later suggest that a qualifying destination would have to be one "that is likely to have a direct line of communication to the foreign minister." *Id.* at 34. But that limitation is hardly meaningful or discernable, as many of a foreign state's offices inside or outside of its home territory might have a "direct line of communication to the foreign minister."

Even the Second Circuit was unwilling to go this far: "We do not suggest that service could be made on a minister of foreign affairs via other offices in the United States or another country maintained by the country in question, such as *e.g.*, a consular office, the country's mission to the United Nations, or a tourism office." JA214 n.3. But the Second Circuit did not articulate any principled reason why service could not be accomplished "via" innumerable other destinations; the Second Circuit simply did not want to endorse the logical implications of its interpretation of §1608(a)(3).

Plaintiffs point out that the word "addressed" appears in §1608(a)'s definition of "notice of suit" and is used there in the sense that the notice must be directed to the foreign state. Pls.' Br. 20-21. But there the word is not being used in the context of the mailing of a package. *See Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) ("In law as in life, . . . the

same words, placed in different contexts, sometimes mean different things. We have several times affirmed that identical language may convey varying content when used . . . even in different provisions of the same statute."). In §1608(a)(4), which calls for the service package to be sent by a mailing "addressed and dispatched" to the Secretary of State, the word "addressed" is used in the context of a mailing, and even Plaintiffs do not dispute that the mailing must be sent to the Secretary's address. Pls.' Br. 22.

Speaking of §1608(a)(4), Plaintiffs argue that its reference to the "Secretary of State *in Washington, District of Columbia*" contrasts with the supposed "silence" in §1608(a)(3). Pls.' Br. 22, 30-31 (emphasis added). But, far from contrasting, both provisions are naturally read to require the mailing to the head of the ministry of foreign affairs (called the Secretary of State here) in the nation's capital city. The greater specificity in §1608(a)(4) is understandable given that it is referring to one head of a ministry of foreign affairs, whereas §1608(a)(3) is referring to many scattered around the globe.

Plaintiffs dispute that the specification of the Secretary of State "in Washington, District of Columbia" was necessary to distinguish the federal Secretary from state counterparts, suggesting that no one would try to serve a foreign state through a secretary of state from one of the fifty states. Pls.' Br. 30. Experience suggests otherwise. *See, e.g.*, *Magness*, 247 F.3d at 611 (vacating default judgment based on attempted service of foreign state through Texas Secretary of State). Indeed, secretaries of state

among the fifty states commonly have a role in service of process on out-of-state entities. *See, e.g.*, Tex. Bus. Orgs. Code Ann. §5.251; N.Y. Bus. Corp. Law §304(a); 805 Ill. Comp. Stat. 5/5.25(b).

Plaintiffs also argue that specifying the Secretary of State "in Washington, District of Columbia" did not resolve any ambiguity because, Plaintiffs say, "the District of Columbia has a Secretary of State of its own." Pls.' Br. 30-31. In fact, the District of Columbia does not have its own "Secretary of State," but rather a "Secretary of the District of Columbia," and even that office did not exist at the time of the FSIA's enactment. *See* D.C. Mayor's Order 84-77 (Apr. 16, 1984) (establishing the office of the Secretary of the District of Columbia).

Notably, Plaintiffs provide no rebuttal whatsoever to the argument that their approach to statutory interpretation would permit a mailing to the Secretary of State not only at the State Department headquarters but, because indirect delivery is not expressly foreclosed by §1608(a)(4), also "via" some intermediary as long as it was "in Washington, District of Columbia."

Plaintiffs are plainly mistaken in asserting that "every court to have considered the question" has found that §1608(a)(3) does not specify the location for the mailing. Pls.' Br. 21. In fact, the D.C. and Fifth Circuits have found that §1608(a)(3), by its terms, requires process to be mailed to the foreign minister's office and *not* to the foreign state's embassy in Washington. *See* Sudan Br. 25-26 (collecting cases); U.S. Br. 14 (same); *see also* Pls.' Br.

32 (acknowledging cases requiring mailing to foreign ministry).

Plaintiffs also maintain that permitting service by mail on an embassy would minimize the "undesirable" resort to service through diplomatic channels (Pls.' Br. 24), but such comments only expose Plaintiffs' misunderstanding of how §1608(a) operates. Service by diplomatic channels, as contemplated in §1608(a)(4), is the only service method that may be *imposed* upon a foreign state under international law. *See, e.g.*, United Nations Convention on Jurisdictional Immunities of States and Their Property, art. 22, *opened for signature* Jan. 17, 2005, 44 I.L.M. 803; Int'l Law Profs. Amicus Br. 13-16 & n.10 (discussing U.N. Convention and other states' laws on service of process on foreign states). All other means of service under §1608(a) are dependent upon a foreign state providing some form of consent to another method of service: §1608(a)(1) through a "special arrangement"; §1608(a)(2) through an agreed-upon "international convention"; and §1608(a)(3) through a signed receipt from the ministry of foreign affairs. If the foreign state has not consented to service under (a)(1)-(3), a plaintiff can *always* resort to the fail-safe method of (a)(4) to accomplish service consistent with international law. As the United States observes, Plaintiffs (and the Second Circuit) are mistaken in assuming that service under (a)(3) "should be available in most circumstances." U.S. Br. 9, 19.

Plaintiffs assert that a mailing to the foreign minister at the ministry ordinarily would be accepted and signed for by a mailroom employee, so the use of

intermediaries is unavoidable. Pls.' Br. 27, 29. But, assuming that is the case, Plaintiffs ignore the vast difference between a mailroom employee in the minister's own ministry and a mailroom employee in one of the foreign state's far-flung diplomatic missions. *Cf.* 28 U.S.C. §1608(b)(2) (expressly permitting service on an agency or instrumentality's "agent authorized by appointment or by law to receive service of process in the United States," and having no counterpart in §1608(a)(3)).

Plaintiffs are incorrect that there is "nothing unnatural" about a hypothetical §1608(a)(3) that provides: "addressed and dispatched to the head of the ministry of foreign affairs of the foreign state concerned at the foreign state's American embassy" (Pls.' Br. 25). Such a provision would indeed be unnatural, as it would call for a package to be addressed and dispatched to a location where the minister of foreign affairs is not present. In the absence of a contrary indication, a requirement that a mailing be "addressed and dispatched" to someone is naturally understood to require the mailing to be sent to that person's address. *See Samantar*, 560 U.S. at 314-19 (holding that interpretation that is not expressly foreclosed by text of FSIA is nonetheless unsound given context).

Admittedly, §1608(a)(3) could have added "in the foreign state" or "in the foreign state's capital." *See* Pls. Br. 31 n.4. But that would have risked redundancy for the sake of clarity. Plaintiffs provide examples from the U.S. Code where Congress has taken that step (Pls.' Br. 22-23), but a statute does not *require* such redundancy where the terms are

already sufficiently clear. Notably, for all their canvassing of the U.S. Code, Plaintiffs are unable to identify a single section that allows service by mail to a place other than the intended recipient's address.

Plaintiffs do not dispute that under §1608(c)(2) the foreign state's 60-day clock begins to run upon the signature of the postal receipt. Pls.' Br. 27-28. Rejecting the idea that this trigger contemplates receipt by the foreign minister rather than by some distant intermediary, Plaintiffs blithely suggest that the foreign state can seek to vacate an entry of default or even default judgment, if the package does not reach the minister in time. *Id.* Sections 1608(a)(3) and (c)(2) are most naturally read together to require a mailing to the foreign ministry and the running of the 60-day clock upon signature there.

The terms of 22 C.F.R. §93.1(e) are not to the contrary, despite Plaintiffs' suggestion otherwise (Pls.' Br. 28). That regulation contemplates service by diplomatic means under §1608(a)(4), which in certain circumstances may be upon the embassy, and such service is consummated upon delivery to the embassy. *See also* Letter from L. Yelin to Clerk of Court, *Kumar*, 880 F.3d at 144 (No. 16-2267) ("In some unusual circumstances, or if the foreign state so requests, the State Department will transmit process to a foreign state's embassy in the United States."). Notably, §1608(a)(4), in contrast to §1608(a)(3), does not require delivery to the foreign minister but delivery "through diplomatic channels to the foreign state" and §1608(c)(1) provides that service under (a)(4) is deemed to have been made upon transmittal.

Finally, while acknowledging that §1608(a)(3) must be followed strictly (Pls.' Br. 34; Sudan Br. 20, 24; U.S. Br. 18), Plaintiffs assert that they followed the provision "to the letter" and that it would be "the height of unfairness" to vacate their default judgment. Pls.' Br. 35. But, Plaintiffs' service package misidentified Sudan's minister of foreign affairs, was improperly addressed to Sudan's embassy rather than to the actual minister in Khartoum, and apparently was never even delivered to the embassy. Sudan Br. 7; JA74-75. And, when Plaintiffs' counsel prepared their mailing in 2010, they knew from their representation in the 2004 *Rux* case in the Eastern District of Virginia that Sudan disputed the legality of service by mail on its embassy and that Sudan had substantial arguments in its favor. Moreover, in choosing to file this case in the District of Columbia, Plaintiffs' counsel were proceeding in the face of the D.C. Circuit's *Transaero* case, under which service is to be sent to the foreign ministry. *See* 30 F.3d at 154. Under these circumstances, vacating the default judgment, which was based on a one-day evidentiary hearing (JA89), is hardly unfair.

II. The Vienna Convention Prohibits Mailing Service Of Process To A Diplomatic Mission

Throughout this case, Plaintiffs have consistently conceded that, under the Vienna Convention (and thus under §1608(a)(3)), process may not be served, by mail or otherwise, "on" an embassy; for this reason, Plaintiffs have argued that they served process "via" or "care of" — but not "on" — Sudan's Embassy in the United States. *See, e.g.*, Plaintiffs'

Opposition to Petition for Rehearing 2, *Harrison v. Republic of Sudan*, 802 F.3d 399 (2d Cir. 2015) ("Plaintiffs-Appell[ees] do not dispute that service directly on an embassy or consular official is improper . . . ."); Pls.' Pet. Opp'n 6 ("If service were permitted directly on an embassy or consular official, ***which it is not*** . . . ." (emphasis added)); *id.* at 14 (stating that "numerous procedural errors, including improperly directly serving the Embassy" by "mailing," led to dismissal for improper service in *Ellenbogan v. The Canadian Embassy*, Civ. No. 05-01553(JBD), 2005 WL 3211428 (D.D.C. Nov. 9, 2005)); *id.* at 17 ("The Vienna Convention Prohibits Service on an Embassy or Consular Official, Not Service Via Mail Forwarded by an Embassy" (heading)). The Second Circuit accepted Plaintiffs' argument, holding that the Vienna Convention (and §1608(a)(3)) prohibited service "on" an embassy, including by mail, but not "via" or "care of" an embassy. JA222 ("[S]ervice on an embassy or consular official would be improper. But that is not what happened here."); *id.* (acknowledging that "the FSIA's legislative history makes clear that service by mail on an embassy is precluded under the Act" (citation omitted)).

In a dramatic reversal that betrays the weakness of their prior position, Plaintiffs abandon their longstanding reliance on the purported distinction between service "on" versus service "via" an embassy, and instead argue for the first time that the Vienna Convention *permits* service on an embassy by mail. *See, e.g.*, Pls.' Br. 37 ("The Convention does not limit service of process by mail."); *see also generally id.* at 16-17; 35-49. This argument is waived. *See Buck v.*

Davis, 137 S. Ct. 759, 780 (2017) (holding that respondent waived argument "not advanced in District Court, before the Fifth Circuit, or in [his] brief in opposition to [the] petition for certiorari"). Plaintiffs' new argument is also meritless.

In arguing that the text of the Convention permits service by mail to an embassy, Plaintiffs misread Article 22. Pls.' Br. 37-38. The inviolability accorded in the first sentence of Article 22(1) is not limited to the second sentence's express prohibition on unauthorized entry. Pls.' Br. 37. Article 22(2) specifically imposes on the receiving state a "special duty" to protect a mission against "any intrusion or damage" and to prevent "any disturbance of the peace of the mission or impairment of its dignity." These provisions, and parallel ones protecting diplomatic agents (Article 29), have caused Circuit courts *uniformly* to prohibit service of process upon an inviolable mission or diplomat, even as agent for another. *See* Sudan Br. 37 (citing *Autotech*, 499 F.3d at 748; *767 Third Ave.*, 988 F.2d at 301); *see also Kumar*, 880 F.3d at 157, 159 n.11; *Tachiona v. United States*, 386 F.3d 205, 224 (2d Cir. 2004) (accepting U.S. Government's representation that, even when served as agent, "service of process on a person entitled to diplomatic immunity both interferes with that person's representative functions and constitutes an affront to his or her dignity"); *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 980-81 (D.C. Cir. 1965) (accepting U.S. Government's concern that permitting service of process upon Ambassador as agent for his state "would prejudice the United States fo. ›ign relations and would probably impair the performance of diplomatic functions").

Plaintiffs invoke "common sense" (Pls.' Br. 38), but common sense only confirms that a jurisdiction-asserting summons — signed by a U.S. court clerk, bearing the court's seal, and demanding the appearance of the defendant (Fed. R. Civ. P. 4(a)(1)) — is an exercise of U.S. sovereignty likely to disrupt operations at the embassy and impair its dignity. Sudan Br. 37-38.

A journal source cited by Plaintiffs (Pls.' Br. 38) (and one of their amici) underscores this point: "What could perhaps constitute an infringement would be if the writ had the form of a binding order directed against a foreign state, e.g. to appear in court or to reply within a certain period of time, but then it would be the content of the writ that creates the problem and not the way it is conveyed to the mission." Rolf Einar Fife & Kristian Jervell, *Elements of Nordic Practice 2000: Norway*, 70 Nordic J. Int'l L. 531, 554 (2001).

It is no answer for Plaintiffs to state that, if service by mail upon an embassy is an infringement, "it is hard to see why service of process by mail at a foreign ministry would be permissible" (Pls.' Br. 38). The foreign ministry in the foreign state's capital is not a "mission" under the Vienna Convention and does not enjoy inviolability under Article 22 or otherwise.

Plaintiffs likewise cannot brush aside the inviolability of the embassy's diplomatic correspondence under Article 27(2) of the Convention (Pls.' Br. 38). The receiving state cannot dictate what an embassy transmits to the foreign minister, even if a mail clerk at the embassy happens to sign a return

receipt. Sudan Br. 45-47.

Finally, even under Plaintiffs' narrow conception of inviolability, the purported service of process here was an infringement. The mail carrier delivering a service package issued by a U.S. court clerk and requiring a return receipt is necessarily acting as an "agent[] of the receiving State" (Vienna Convention, art. 22(1)) in entering the embassy premises for delivery and signature, even if a mail carrier dropping off routine mail arguably is not.

Plaintiffs also misread the negotiating history of the Vienna Convention (Pls.' Br. 40-41), oddly latching onto a proposal to allow service by mail even though the proposal was ultimately rejected and withdrawn. That rejection and withdrawal is established on the United Nations' official record by Japanese representative Mr. Takahashi, who stated in 1961, accurately and without objection, that the "unanimous interpretation" of the Committee of the Whole was that "no writ could be served, even by post, within the premises of a diplomatic mission." U.N. Conference on Diplomatic Intercourse & Immunities, *Summary Records of Plenary Meetings & of Meetings of the Committee of the Whole*, at 141, U.N. Doc. A.CONF.20/14, U.N. Sales No. 61.X.2 (1962) [hereinafter U.N. Conf. Summary Records]. Plaintiffs (and their amici) go to great lengths to dispute the official record of the 1961 Conference, primarily by relying on the ILC's 1958 negotiations and report and a flawed account by a U.S. representative who attended the 1961 Conference.

Plaintiffs first wrongly assert that even the "prevailing understanding of the drafters at the ninth

session" of the ILC in 1957 was that judicial notices could be served through the post (Pls.' Br. 40). In fact, the 1957 summary records make clear that *only* Sir Gerald Fitzmaurice, from the United Kingdom, suggested that service on a mission by post would be acceptable. Summary Records of the Ninth Session, [1957] 1 Y.B. Int'l L. Comm'n 65, U.N. Doc. A/CN.4/SER.A/1957. The ILC disregarded Sir Fitzmaurice's suggestion and approved the categorical commentary: "No process may be served at the premises of the mission." *Id.* at 64-66.

And the 1957 records are not "obsolete" (Pls.' Br. 39). Indeed, U.S. courts, including this Court, have relied upon these records. *See, e.g., Perm. Mission of India to the U.N. v. City of New York*, 551 U.S. 193, 201 (2007); *Swarna v. Al-Awadi*, 622 F.3d 123, 135 (2d Cir. 2010); *767 Third Ave.*, 988 F.2d at 301.

While Plaintiffs are correct that the ILC in 1958 entertained the possibility of allowing service by mail (Pls.' Br. 40), the 1958 discussion and the commentary are at least ambiguous, because many of the ILC members appear to have been grappling with the problem of serving a diplomatic agent who did not have immunity in the particular suit, rather than service on the state itself. *See* Summary of Observations Received from Governments & Conclusions of the Special Rapporteur, at 38, U.N. Doc. A/CN.4/116 (May 2, 1958) (U.S. statement and Special Rapporteur's response); Summary Records of the Tenth Session, [1958] 1 Y.B. Int'l L. Comm'n 130-32, U.N. Doc. A/CN.4/SER.A/1958 [hereinafter 1958 ILC Yearbook Vol. I]. That concern was understandable given that service on a diplomatic

agent, if not permitted through diplomatic channels, may in some countries be impossible. *See, e.g., Reyes v. Al-Malki* [2017] UKSC 61, [15] (noting that service on a diplomatic agent through diplomatic channels is not "a legally effective mode of service" in the U.K.). But the summary records of the 1961 Vienna Conference show that work on the Vienna Convention "did not end" in 1958 and that the Committee of the Whole ultimately rejected *any* exception to the inviolability of a mission, including service by mail. *See generally* U.N. Conf. Summary Records at 135-43.

In 1961, the Japanese delegation to the Vienna Conference proposed a new paragraph to then Article 20 ("4. No writ may be served by a process server within the premises of the mission.") because the permissibility of service by mail on a mission, as contemplated in the 1958 commentary, was in Japan's view, not evident from Article 20's text. *See* U.N. Conference on Diplomatic Intercourse & Immunities, *Annexes, Final Act, Vienna Convention on Diplomatic Relations, Optional Protocols, Resolutions*, at 22, U.N. Doc. A/CONF.20/14/Add.1 (Vol. II), U.N. Sales No. 62.X1.1 (1962) [hereinafter U.N. Conf. Annexes] (reproducing U.N. Conference on Diplomatic Intercourse & Immunities, *Japan: amendment to article 20*, U.N. Doc. A/CONF.20/C.1/L.146 (Mar. 14, 1961)). The Japanese delegation intended the amendment to permit service by post by negative implication (*id.*), as Plaintiffs themselves recognize (Pls.' Br. 41).

Ultimately, the Japanese representative withdrew the amendment "on the understanding that it was

the unanimous interpretation of the Committee [of the Whole] that no writ could be served, even by post, within the premises of a diplomatic mission." U.N. Conf. Summary Records at 141.

The Conference records confirm broad opposition to the Japanese amendment as well as to *all* other exceptions to inviolability, even those related to life-or-death emergency. *See, e.g.*, U.N. Conf. Summary Records at 136-37, 140-41 (describing statements of representatives from Bulgaria, Sweden, Argentina, Colombia, Guatemala, Italy, Romania, and Senegal (all resoundingly rejecting exceptions to mission inviolability)). This voluminous record powerfully contradicts Plaintiffs' assertion that Mr. Takahashi's statement "has no support in the underlying conference records." Pls.' Br. 42.

Moreover, Plaintiffs' assertion that several members of the Committee of the Whole indicated "support of service by post on diplomatic premises" (*id.*) is demonstrably incorrect. Only the Turkish representative expressed any support for service by post; the Norwegian and Soviet representatives opposed the Japanese amendment. *See* U.N. Conf. Summary Records at 140; *id.* at 137 (stating Norwegian "delegation considered it preferable *not to introduce* into the convention a provision such as that proposed by Japan, in view of the difficulty of finding a satisfactory formula" (emphasis added)); *id.* (concluding that the Soviet Union favored wording improvements only and "would vote against all other amendments to article 20").

Plaintiffs misplace reliance on a report written by a U.S. representative at the Vienna Conference, Mr.

Ernest Kerley. *See* Pls.' Br. 42 (citing Ernest Kerley, *Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities*, 56 Am. J. Int'l L. 88, 102 (1962)). Mr. Kerley wrote that Mr. Takahashi "stated that discussion within the Committee had established a unanimous consensus that service *could be* effected by mail" (*id.* (emphasis added)), when, in fact, the official Conference records indicate Mr. Takahashi said the opposite (U.N. Conf. Summary Records at 141 (stating he was withdrawing his proposed amendment "on the understanding that it was the unanimous interpretation of the Committee that no writ could be served, even by post")). Later authors blindly relied upon Mr. Kerley's account. *See* Pls.' Br. 45 (citing Richard Crawford Pugh & Joseph McLaughlin, *Jurisdictional Immunities of Foreign States*, 41 N.Y.U. L. Rev. 25, 32 n.35 (1966) (citing Kerley, *supra*, at 102); Andreas Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U. L. Rev. 901, 934 n.99 (1969) (same)).

Nor is Mr. Takahashi's statement inconsistent with Mr. Yokota's statement in 1958, as Plaintiffs assert (Pls.' Br. 42-43 (citing 1958 ILC Yearbook Vol. I at 131)). Mr. Yokota stated that Japan allowed service by mail, and Mr. Takahashi proposed to make clear "one way or the other" that Article 20 allowed it or did not. U.N. Conf. Annexes at 22.

Significantly, the State Department in 1974 credited Mr. Takahashi's statement in drafting the FSIA: his statement is cited as support for the State Department's understanding that service of process

by mail on an embassy was precluded by Article 22(1). 71 Dep't of State Bull. 429, 458-59 (1974) (quoting Diplomatic Note of July 11, 1974 (citing U.N. Conf. Summary Records at 141, where Mr. Takahashi's statement is found)); *see also* Sudan Br. 52-53.

Plaintiffs next turn to the views of U.S. treaty partners, which Plaintiffs agree are entitled to "considerable weight" in interpreting the terms of a treaty. Pls.' Br. 43. Yet Plaintiffs rely almost exclusively on a decision from a court of a single treaty party, in a case that does not even involve service of process on a foreign state. Pls.' Br. 43. Indeed, the U.K. Supreme Court, in *Reyes* [2017] UKSC 61, *distinguished* service upon states from service upon diplomatic agents, stating that, under U.K. law, service on states "must be effected" through diplomatic channels, while service on a diplomatic agent through diplomatic channels was "not even a legally effective mode of service" in the United Kingdom. *Id.* at [15].

In assessing service on diplomatic agents, the U.K. Supreme Court (*Reyes* [2017] UKSC 61 [13]) adopted the analysis of the U.K. Court of Appeal, which relied on the D.C. District Court's 1973 opinion in *Renchard v. Humphreys & Harding, Inc.*, 59 F.R.D. 530 (D.D.C. 1973). *See Reyes v. Al-Malki* [2015] EWCA (Civ) 32 [87]-[88], [91]. But *Renchard* was decided *before* the FSIA was enacted, does not address the Vienna Convention at all, and is therefore irrelevant to the question of service of process on a foreign state.

To the extent that *Reyes* can be read as

supporting service of compulsory process by mail upon an embassy, the case, decided in 2017, does not inform this Court about the consensus meaning of mission inviolability in 1976 when Congress looked to the Vienna Convention in revising and enacting §1608(a)(3). And even today, *Reyes* is contrary to the views of many other treaty partners, specifically Sudan's amici (including the United States) and courts of other foreign nations. *See, e.g.*, Sudan Br. 46-47 (citing amicus briefs); Int'l Law Profs. Amicus Br. 11-12 (citing cases); U.S. Br. 21-23; *see also United States v. Zakhary*, [2015] F.C. 335 (Can. Ont.) (holding that service of complaint sent by registered mail to the U.S. consulate in Toronto violated service provisions of Canada's State Immunities Act and Article 22 of the Vienna Convention). Plaintiffs attempt to malign and minimize the considered views of Sudan's amici (Pls.' Br. 45, n.11). Yet these states have a keen interest in seeing §1608(a)(3) interpreted correctly, as they (unlike the United Kingdom) cannot be served under §1608(a)(2) because they are not signatories to any "applicable international convention on service of judicial documents," such as the Hague Convention.

These treaty partners' views are significant: Plaintiffs fail to recognize (Pls.' Br. 47) that Sudan *does* directly assert a violation of the Vienna Convention. As Sudan explained, because the Vienna Convention itself "forms part of U.S. law" (as both a self-executing treaty and as enacted by the Diplomatic Relations Act of 1978), the Second Circuit "was required to reject a method of service of process that violated the terms of the Vienna Convention." Sudan Br. 31-33 (citing *Tabion*, 73 F.3d at 539; *767*

Third Ave., 988 F.2d at 302); *see also* Sudan Pet. 25-27 ("The Panel Opinion Places the United States in Violation of The Vienna Convention" (heading)). And thus, contrary to Plaintiffs' assertions, the views of the United States interpreting the Vienna Convention are also directly relevant here and indisputably entitled to "great weight." *Water Splash*, 137 S. Ct. at 1512.

Section 1604 of the FSIA further confirms that §1608 should be interpreted in view of this consensus on Article 22. Sudan Br. 33-35. By its text, §1604 makes "jurisdiction" over a foreign state "[s]ubject to existing international agreements," and "jurisdiction" depends on the existence of an immunity exception *and* effective service of process under §1608. 28 U.S.C. §1330(b). Plaintiffs misplace reliance on the deletion of this provision from §1608 (Pls.' Br. 36-37), which simply removed redundancy. The FSIA's legislative history only reinforces that Congress intended the *entire act* to be "subject to existing international agreements." H.R. Rep. No. 94-1487, at 10 ("[T]he reference to existing international agreements is essential to make clear that this bill would not supersede the special procedures provided in existing international agreements . . . .").

III. Legislative History Confirms That Congress Intended For §1608(a)(3) To Preclude Mailing Process To A Diplomatic Mission

Plaintiffs wishfully assert that the legislative history "sheds little light" on whether §1608(a)(3) allows service of process on an embassy (Pls.' Br. 50), but this could not be further from the truth. The House Report does not by any stretch limit its

discussion to "the discrete issue" of service directed to an ambassador; it states explicitly that §1608 was revised to preclude "service on *an embassy* by mail," to address the State Department's concern that service mailed to an embassy would violate the Vienna Convention. H.R. Rep. No. 94-1487, at 26 (emphasis added).

Moreover, the language in §1608(a)(3) was amended to track the language in place at the time for serving an individual *in a foreign country*, further suggesting that §1608(a)(3) requires the service package to be mailed to the ministry of foreign affairs in the foreign country and not to the embassy in the United States. *See* U.S. Br. 31 (citing H.R. Rep. 94-1487, at 24; Fed. R. Civ. P. 4(i)(1)(D) (1976)).

The State Department's role in drafting the FSIA is precisely why "special attention" should be given to the views of the United States here. *See Helmerich*, 137 S. Ct. at 1320; *cf.* Pls.' Br. 46. And the purportedly inconsistent historical position of the United States on the meaning of Article 22 (from nearly half a century ago) is of no consequence given the clear position of the United States on the legality of service mailed to an embassy at the time the FSIA was enacted. *See* Sudan Br. 52-54.

IV. U.S. Interests Would Be Undermined If Mailing Process To A Diplomatic Mission Were Permitted Under §1608(a)(3)

Plaintiffs are off base in second-guessing the determination of the United States as to where its interests lie (Pls.' Br. 18, 51-52). Given diplomatic and reciprocity concerns, the United States has

reasonably determined that it has a substantial interest in having the FSIA's service provisions (and the Vienna Convention) applied strictly in U.S. courts, and in avoiding a U.S. precedent endorsing service on or "via" an embassy, even though the United States insists on service through diplomatic channels or under the Hague Service Convention. U.S. Br. 10, 24-26. Finally, Plaintiffs and their amici have no justification to charge the United States with abandoning its veterans, when the United States is simply reiterating legal positions it has espoused consistently in amicus briefs in a host of FSIA cases over the years.

CONCLUSION

For the foregoing reasons and those stated in Sudan's opening Brief, this Court should reverse the decision of the Second Circuit.

Respectfully submitted,

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October 18, 2018

No. 16-1094

In the Supreme Court of the United States

REPUBLIC OF SUDAN, PETITIONER

v.

RICK HARRISON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

On January 19, 2018, the Fourth Circuit issued its decision in *Kumar* v. *Republic of Sudan*, 880 F.3d 144. That decision addresses service of process on Sudan, by the same means used here, in another suit arising from the U.S.S. Cole bombing. The Fourth Circuit held that delivering a service packet addressed to Sudan's minister of foreign affairs at the Sudanese embassy in Washington does not comport with the requirements of 28 U.S.C. 1608(a)(3). *Id.* at 158. In so doing, it recognized that "[its] holding conflicts" with the Second Circuit's holding in this case. *Id.* at 159.

In light of the resulting circuit conflict, the *Kumar* plaintiffs, who are represented by the same counsel as respondents here, are simultaneously filing a petition for a

writ of certiorari. The petition asks the Court to grant review in *Kumar* and further suggests that the Court should either grant this petition or hold it pending the disposition of *Kumar*. Respondents refer the Court to the petition in *Kumar* and respectfully request that it be considered together with this petition.

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IN THE

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Petitioner,

v.

RICK HARRISON, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

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SUPPLEMENTAL BRIEF

Petitioner the Republic of the Sudan respectfully submits this supplemental brief pursuant to Rule 15.8 of the Rules of the Supreme Court of the United States in order to bring to the Court's attention a diplomatic communication sent by the Embassy of the Republic of Austria to the U.S. Department of State on April 11, 2017, regarding the decision on review before this Court. The diplomatic communication was not in existence or available to Sudan at the time Sudan filed its Petition for Writ of Certiorari. Austria's diplomatic communication is reproduced at App. 1a-4a.

CONCLUSION

The Republic of the Sudan respectfully requests that the Petition for Writ of Certiorari be granted.

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APPENDIX

APPENDIX

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Ref. PROT/016/2017

Note Verbale

The Embassy of the Republic of Austria presents its compliments to the US Department of State and – with reference to the petition for a writ of certiorari in the case *Republic of Sudan v. Rick Harrison* under review by the U.S. Supreme Court – has the honor to inform the Department of State, in support of the arguments already raised in the *amicus curiae* brief submitted by the U.S. Government before the Second Circuit Court of Appeals, of the following position of the Republic of Austria:

1. Like the United States, Austria has a strong interest in defending a consistent interpretation of customary international law and the Vienna Convention on Diplomatic Relations of 1961 relating to service of process on foreign states. In the case *Harrison v. Republic of Sudan,* the U.S. Foreign Sovereign Immunities Act (FSIA) was construed to allow service on a foreign state via the latter's embassy in the United States if the legal documents are addressed to the foreign minister. That interpretation is inconsistent with international law, undermines the general application of the international duties incumbent on all states, creates a dangerous precedent of general application and is likely to result in an excessive

number of judgments in default of appearance by the defendant state.

2. Austria shares the opinion of the U.S. Government that, independently of the particular case in question, the FSIA must be understood in the light of the recognized rules of international law.

3. In the absence of applicable international agreements or unilateral acts, the service of foreign legal documents on a sovereign state has to be effected through diplomatic channels to the foreign ministry of the state concerned. This rule of customary international law is reflected in Article 22 of the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004) and corroborated by the practice of numerous states as well as judicial decisions.

4. In *Wallishauser v. Austria*, which involved an employee of the U.S. embassy in Vienna, the European Court of Human Rights (ECtHR) held that "according to a well-established principle of international law a rule enshrined in a treaty could be binding on a State as a rule of customary international law even if the State in question had not ratified the treaty, provided that it had not opposed it either." The Court noted in that context "that the United States did not object to the rules contained in Article 20 § (1) (b) (i) and § 2" of the 1991 Draft Articles on Jurisdictional Immunities of States and Their Property, which became Article 22 of the above-mentioned Convention, and that while the United States has not signed or ratified the 2004 Convention, it did not vote against it." (ECtHR, Case of *Wallishauser v. Austria*, Application No. 156/04, Judgment of 17 July 2012, paras. 66 and 69.)

5. Thus, service of process on a foreign state via its embassy in the forum state contradicts this rule of customary international law.

6. Furthermore, Article 22 of the Vienna Convention on Diplomatic Relations (1961) establishes that neither judicial nor administrative acts of public authority by the receiving state are to be exercised on the premises of the diplomatic mission. This includes service of foreign legal documents, both directed at the diplomatic mission itself or at the respective foreign state.

7. In its Commentary on the equivalent provision in the Draft articles concerning diplomatic intercourse and immunities, the International Law Commission (ILC) stated: "A special application of this principle is that no writ shall be served within the premises of the mission, nor shall any summons to appear before a court be served in the premises by a process server. Even if process servers do not enter the premises but carry ou,t their duty at the door, such an act would constitute an infringement of the respect due to the mission. All judicial notices of this nature must be delivered through the Ministry of Foreign Affairs of the receiving State." (Report of the ILC to the General Assembly, UN Doc. A/3623 (1957), in Yearbook of the ILC 1957, Vol. II, United Nations (New York, 1958), p. 137.)

8. Service of foreign legal documents that is not in accordance with the above rules and procedures is to be considered contrary to and therefore not effective under international law.

A copy of this Note Verbale will be transmitted to the counsel of the petitioner in the above-mentioned case.

The Embassy of the Republic of Austria avails itself of this opportunity to renew to the US Department of State the assurances of its highest consideration.

Washington, D.C.
April 11, 2017 [SEAL]

US Department of State
Office of Protocol
2201 C St NW
Washington, DC 20520

No. 16-1094

IN THE

Supreme Court of the United States

REPUBLIC OF SUDAN,

Petitioner,

v.

RICK HARRISON, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

SECOND SUPPLEMENTAL BRIEF FOR PETITIONER

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January 30, 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

SECOND SUPPLEMENTAL BRIEF

Petitioner the Republic of the Sudan respectfully submits this second supplemental brief pursuant to Rule 15.8 of the Rules of the Supreme Court of the United States, in order to advise the Court of the Fourth Circuit's unanimous panel decision in *Kumar v. Republic of Sudan*, No. 16-2267 (4th Cir. Jan. 19, 2018). The *Kumar* decision, reproduced at App. 1a-40a, was not in existence or available to Sudan at the time Sudan filed its Petition for Writ of Certiorari.

The Fourth Circuit's decision in *Kumar* deepens — and makes express — the circuit split on the question presented in Sudan's Petition. As in the *Harrison* case, for which Sudan seeks certiorari review, the *Kumar* plaintiffs had purported to serve Sudan under 28 U.S.C. § 1608(a)(3) by mailing process to Sudan's Embassy in Washington, D.C. App. 20a. On the basis of this purported service, the district court entered a $34 million default judgment against Sudan. App. 21a. The Fourth Circuit has now vacated the default judgment for lack of personal jurisdiction and held that "process is not properly 'addressed and dispatched to' the head of the ministry of foreign affairs as required under § 1608(a)(3) when it is delivered to the foreign state's embassy in Washington, D.C." App. 35a (quoting § 1608(a)(3)).

The Fourth Circuit observed that its "holding adds to the existing tension between the courts of appeals' interpretations of § 1608(a)(3)" and "*conflicts with the view of the Second Circuit*" adopted in *Harrison*. App. 35a-36a (emphasis added) (citing *Harrison v. Republic of Sudan*, 802 F.3d 399, 402-06 (2d Cir.

2015); *Barot v. Embassy of the Republic of Zambia*, 785 F.3d 26, 28, 30 (D.C. Cir. 2015); *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 739, 749-50 (7th Cir. 2007)); *see also* App. 37a n.12. The Fourth Circuit announced it was aligning with the "greater weight" of decisions by other courts of appeals (App. 35a), explaining that it found the Second Circuit's contrary decision in *Harrison* to be "weak and unconvincing" (App. 37a).

Looking first to the text of § 1608(a)(3), the Fourth Circuit reasoned that allowing plaintiffs to serve a foreign state by mail addressed to "any geographic location," as long as the head of a ministry of foreign affairs "is identified as the intended recipient," simply "cannot be consistent with Congress' intent" to ensure the proper officials of a foreign state receive notice of a suit. App. 28a; *see also* App. 29a (noting that a head foreign minister "generally oversees a foreign state's embassies" but "is rarely — if ever — present there"). Finding the statutory language ambiguous, the Fourth Circuit went on to conclude: "the FSIA's legislative history, coupled with the United States' obligations under the Vienna Convention, as well as the 'great weight' accorded the State Department's interpretation of such foreign treaty matters, lead us to the conclusion that subsection (a)(3) is not satisfied by delivery of process to a foreign state's embassy." App. 29a.

The Fourth Circuit held that any "distinction between service 'on' the embassy or 'via' the embassy" — a distinction the Second Circuit adopted in distinguishing decisions by other circuits — is "a meaningless semantic distinction." App. 32a

(concluding that "[e]ither action impinges upon" U.S. obligations under the Vienna Convention, which Congress expressly intended § 1608(a)(3) to protect); *see also* App. 37a & n.11 (criticizing *Harrison*'s "artificial, non-textual distinction between service 'on' the embassy and service 'via' the embassy"). The Fourth Circuit instead accorded "great weight" and deferred to the State Department's "authoritative" and "reasoned" interpretation of the Vienna Convention and the FSIA, stating that permitting service "via" an embassy would compromise the "legitimacy and sustainability" of the United States' own policy of refusing such service abroad. App. 34a; *see also* App. 37a n.11 (observing that the Second Circuit's decision "seems to accord the State Department's view no weight at all").

CONCLUSION

Kumar underscores, and makes express, the unequivocal circuit split regarding the proper interpretation of § 1608(a)(3). The conflict between the circuits as to what constitutes effective service under § 1608(a)(3) could hardly be more square: *Kumar* and *Harrison* involved the same underlying incident, the same service method, and the same subsection of the same statute. But the Second and Fourth Circuits have reached opposing outcomes on the same legal question, with the Fourth Circuit aligning with prior decisions by the D.C., Fifth, and Seventh Circuits. *See* Pet. 14-16.

The short side of the split, namely the Second Circuit's decision in *Harrison*, will continue to cause friction in U.S. foreign policy and relations — both in

U.S. litigation against foreign states and in foreign litigation against the United States — until this Court resolves the split.

The Republic of the Sudan, therefore, respectfully requests that its Petition for Writ of Certiorari be granted.

Respectfully submitted,

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January 30, 2018

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed 01/19/2018]

No. 16-2267

AVINESH KUMAR, Individually and as the Guardian of the Estate and Next Friend of C.K., a minor; JENNIFER CLODFELTER, Individually and as Next Friend of N.C., a minor; JOHN CLODFELTER; GLORIA CLODFELTER; JOSEPH CLODFELTER; SHARLA COSTELOW, Individually and as the Next Friend of E.C. and B.C., minors; GEORGE COSTELOW; DOROTHY COSTELOW; RONALD W. FRANCIS; SANDRA FRANCIS; DAVID FRANCIS; JAMES FRANCIS; SARAH GUANA ESQUIVEL; LOU GUNN; MONA GUNN; ANTON J. GUNN; JAMAL GUNN; JASON GUNN; NOVELLA WIGGINS; DIANE MCDANIELS, Individually and as Next Friend of J.M., a minor; FREDERICKA MCDANIELS-BESS; JESSE NIETO; JAMIE OWENS, Individually and as the Guardian of the Estate and Next Friend of I.M.O., a minor; KENYON EMBRY; TERESA SMITH; HUGH M. PALMER; LEROY PARLETT; ETTA PARLETT, Individually and as Next Friend of H.P., a minor; KERA PARLETT MILLER; MATTHEW PARLETT; KATE BROWN; SEAN WALSH; KEVIN ROY; OLIVIA RUX; ROGELIO SANTIAGO; SIMEONA SANTIAGO; JACQUELINE SAUNDERS, Individually and as the Guardian of the Estate and Next Friend for J.T.S., a minor; ISLEY GAYLE SAUNDERS; GARY

SWENCHONIS, SR.; DEBORAH SWENCHONIS; SHALALA SWENCHONIS-WOOD; LORIE D. TRIPLETT, Individually and as the Guardian of the Estate and Next Friend of A.T. and S.R.T., minors; SAVANNAH TRIPLETT; FREDDIE TRIPLETT; THEODIS TRIPLETT; KEVIN TRIPLETT; WAYNE TRIPLETT; THOMAS WIBBERLY; PATRICIA A. WIBBERLY; TONI WIBBERLY; TIMOTHY P. SCEVIOUR, as Personal Representative of the Estates of KENNETH EUGENE CLODFELTER, RICHARD COSTELOW, LAKEINA MONIQUE FRANCIS, TIMOTHY LEE GAUNA, CHERONE LOUIS GUNN, JAMES RODERICK MCDANIELS, MARC IAN NIETO, RONALD SCOTT OWENS, LAKIBA NICOLE PALMER; TIMOTHY P. SCEVIOUR, as Personal Representative of the Estates of JOSHUA LANGDON PARLETT, PATRICK HOWARD ROY, KEVIN SHAWN RUX, RONCHESTER MANANGA SANTIAGO, TIMOTHY LAMONT SAUNDERS, GARY GRAHAM SWENCHONIS, JR., ANDREW TRIPLETT and CRAIG BRYAN WIBBERLY,

Plaintiffs-Appellees,

and

REED TRIPLETT,

Plaintiff,

and

OLLESHA SMITH JEAN; JACK EARL SWENSON,

Consolidated Plaintiffs,

v.

REPUBLIC OF SUDAN,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Amicus Supporting Appellant.

No. 16-2269

TIMOTHY P. SCEVIOUR, as personal representative of the estate of KENNETH EUGENE CLODFELTER; JENNIFER CLODFELTER, individually and as next friend of N.C., a minor; JOHN CLODFELTER; GLORIA CLODFELTER; JOSEPH CLODFELTER,

Plaintiff-Appellee,

v.

REPUBLIC OF SUDAN,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Amicus Supporting Appellant.

No. 16-2271

TIMOTHY P. SCEVIOUR, as personal representative of the estate of RICHARD COSTELOW; SHARLA COSTELOW, individually and as next friend of E. C. and B.C., minors; GEORGE COSTELOW; DOROTHY COSTELOW,

Plaintiff-Appellee,

v.

REPUBLIC OF SUDAN,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Amicus Supporting Appellant.

No. 16-2272

TIMOTHY P. SCEVIOUR, as personal representative of the estate of LAKEINA MONIQUE FRANCIS; RONALD W. FRANCIS; SANDRA FRANCIS; DAVID FRANCIS; JAMES FRANCIS,

Plaintiff-Appellee,

v.

REPUBLIC OF SUDAN,

Defendant-Appellant,

UNITED STATES OF AMERICA,

Amicus Supporting Appellant.

No. 16-2273

TIMOTHY P. SCEVIOUR, as personal representative of the estate of TIMOTHY LEE GUANA; SARAH GUANA ESQUIVEL,

Plaintiff-Appellee,

v.

REPUBLIC OF SUDAN,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Amicus Supporting Appellant.

No. 16-2275

TIMOTHY P. SCEVIOUR, as personal representative of the estate of CHERONE LOUIS GUNN; LOU GUNN; MONA GUNN; ANTON J. GUNN; JASON GUNN,

Plaintiff-Appellee,

v.

REPUBLIC OF SUDAN,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Amicus Supporting Appellant.

No. 16-2276

TIMOTHY P. SCEVIOUR, as personal representative of the estate of JAMES RODERICK MCDANIELS; NOVELLA WIGGINS; DIANE MCDANIELS, individually and as next friend of J.M. a minor; FREDERICKA MCDANIELS-BESS,

Plaintiff-Appellee,

v.

REPUBLIC OF SUDAN,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Amicus Supporting Appellant.

No. 16-2280

TIMOTHY P. SCEVIOUR, as personal representative of the estate of MARC IAN NIETO; JESSE NIETO,

Plaintiff-Appellee,

v.

REPUBLIC OF SUDAN,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Amicus Supporting Appellant.

No. 16-2281

TIMOTHY P. SCEVIOUR, as personal representative of the estate of RONALD SCOTT OWENS; JAMIE OWENS, individually and as the guardian of the estate and next friend of I.M.O., a minor,

Plaintiff-Appellee,

v.

REPUBLIC OF SUDAN,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Amicus Supporting Appellant.

No. 16-2282

TIMOTHY P. SCEVIOUR, as personal representative of the estate of LAKIBA NICOLE PALMER; AVINESH KUMAR, individually and as the guardian of the estate and next friend of C.K., a minor; KENYON EMBRY; TERESA SMITH; HUGH M. PALMER; JACK EARL SWENSON; OLLESHA SMITH JEAN,

Plaintiff-Appellee,

v.

REPUBLIC OF SUDAN,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Amicus Supporting Appellant.

No. 16-2283

TIMOTHY P. SCEVIOUR, as personal representative of the estate of JOSHUA LANGDON PARLETT; LEROY PARLETT; ETTA PARLETT, individually and as next friend of H.P., a minor; KERA PARLETT MILLER; MATTHEW PARLETT,

Plaintiff-Appellee,

v.

REPUBLIC OF SUDAN,

Defendant-Appellant,

UNITED STATES OF AMERICA,

Amicus Supporting Appellant.

No. 16-2284

TIMOTHY P. SCEVIOUR, as personal representative of the estate of PATRICK HOWARD ROY; KATE BROWN; SEAN WALSH; KEVIN ROY,

Plaintiff-Appellee,

v.

REPUBLIC OF SUDAN,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Amicus Supporting Appellant.

No. 16-2285

TIMOTHY P. SCEVIOUR, as personal representative of the estate of KEVIN SHAWN RUX; OLIVIA RUX,

Plaintiff-Appellee,

v.

REPUBLIC OF SUDAN,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Amicus Supporting Appellant.

No. 16-2286

TIMOTHY P. SCEVIOUR, as personal representative of the estate of RONCHESTER MANANGA SANTIAGO; ROGELIO SANTIAGO; SIMEONA SANTIAGO,

Plaintiff-Appellee,

v.

REPUBLIC OF SUDAN,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Amicus Supporting Appellant.

No. 16-2287

TIMOTHY P. SCEVIOUR, as personal representative of the estate of TIMOTHY LAMONT SAUNDERS; JACQUELINE SAUNDERS, individually and as the guardian of estate and next friend of J.T.S., a minor; ISLEY GAYLE SAUNDERS,

Plaintiff-Appellee,

v.

REPUBLIC OF SUDAN,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Amicus Supporting Appellant.

No. 16-2288

TIMOTHY P. SCEVIOUR, as personal representative of the estate of GARY GRAHAM SWENCHONIS, JR.; GARY SWENCHONIS, SR.; DEBORAH SWENCHONIS; SHALALA SWENCHONIS-WOOD,

Plaintiff-Appellee,

v.

REPUBLIC OF SUDAN,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Amicus Supporting Appellant.

No. 16-2289

TIMOTHY P. SCEVIOUR, as personal representative of the estate of ANDREW TRIPLETT; LORIE D. TRIPLETT, individually and as the guardian of estate & next friend of A.T. & S.R.T., minors; REED TRIPLETT; SAVANNAH TRIPLETT; FREDDIE TRIPLETT; THEODIS TRIPLETT; KEVIN TRIPLETT; WAYNE TRIPLETT,

Plaintiff-Appellee,

v.

REPUBLIC OF SUDAN,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Amicus Supporting Appellant.

No. 16-2290

TIMOTHY P. SCEVIOUR, as personal representative of the estate of CRAIG BRYAN WIBBERLY; THOMAS WIBBERLY, PATRICIA A. WIBBERLY; TONI WIBBERLY,

Plaintiff-Appellee,

v.

REPUBLIC OF SUDAN,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Amicus Supporting Appellant.

No. 16-2365

AVINESH KUMAR, Individually and as the Guardian of the Estate and Next Friend of C.K., a minor; JENNIFER CLODFELTER, Individually and as Next Friend of N.C., a minor; JOHN CLODFELTER; GLORIA CLODFELTER; JOSEPH CLODFELTER; SHARLA COSTELOW, Individually and as the Next Friend of E.C. and B.C., minors; GEORGE COSTELOW; DOROTHY COSTELOW; RONALD W. FRANCIS; SANDRA FRANCIS; DAVID FRANCIS; JAMES FRANCIS; SARAH GUANA ESQUIVEL; LOU GUNN; MONA GUNN; ANTON J. GUNN; JAMAL GUNN; JASON GUNN; NOVELLA WIGGINS; DIANE MCDANIELS, Individually and as Next Friend of J.M., a minor; FREDERICKA MCDANIELS-BESS; JESSE NIETO; JAMIE OWENS, Individually and as the Guardian of the Estate and Next Friend of I.M.O., a minor; KENYON EMBRY; TERESA SMITH; HUGH

M. PALMER; LEROY PARLETT; ETTA PARLETT, Individually and as Next Friend of H.P., a minor; KERA PARLETT MILLER; MATTHEW PARLETT; KATE BROWN; SEAN WALSH; KEVIN ROY; OLIVIA RUX; ROGELIO SANTIAGO; SIMEONA SANTIAGO; JACQUELINE SAUNDERS, Individually and as the Guardian of the Estate and Next Friend for J.T.S., a minor; ISLEY GAYLE SAUNDERS; GARY SWENCHONIS, SR.; DEBORAH SWENCHONIS; SHALALA SWENCHONIS-WOOD; LORIE D. TRIPLETT, Individually and as the Guardian of the Estate and Next Friend of A.T. and S.R.T., minors; SAVANNAH TRIPLETT; FREDDIE TRIPLETT; THEODIS TRIPLETT; KEVIN TRIPLETT; WAYNE TRIPLETT; THOMAS WIBBERLY; PATRICIA A. WIBBERLY; TONI WIBBERLY; TIMOTHY P. SCEVIOUR, as Personal Representative of the Estates of KENNETH EUGENE CLODFELTER, RICHARD COSTELOW, LAKEINA MONIQUE FRANCIS, TIMOTHY LEE GAUNA, CHERONE LOUIS GUNN, JAMES RODERICK MCDANIELS, MARC IAN NIETO, RONALD SCOTT OWENS, LAKIBA NICOLE PALMER; TIMOTHY P. SCEVIOUR, as Personal Representative of the Estates of JOSHUA LANGDON PARLETT, PATRICK HOWARD ROY, KEVIN SHAWN RUX, RONCHESTER MANANGA SANTIAGO, TIMOTHY LAMONT SAUNDERS, GARY GRAHAM SWENCHONIS, JR., ANDREW TRIPLETT and CRAIG BRYAN WIBBERLY,

Plaintiffs-Appellants,

and

REED TRIPLETT,

Plaintiff,

and

OLLESHA SMITH JEAN; JACK EARL SWENSON,

Consolidated Plaintiffs,

v.

REPUBLIC OF SUDAN,

Defendant-Appellee.

UNITED STATES OF AMERICA,

Amicus Supporting Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Robert G. Doumar, Senior District Judge. (2:10-cv-00171-RGD-TEM)

Argued: October 24, 2017 Decided: January 19, 2018

Before WILKINSON, DUNCAN, and AGEE, Circuit Judges.

Reversed in part, vacated in part, and remanded with instructions by published opinion. Judge Agee wrote

the opinion, in which Judge Wilkinson and Judge Duncan concurred.

ARGUED: Christopher M. Curran, WHITE & CASE, LLP, Washington, D.C., for Appellant/Cross-Appellee. Andrew C. Hall, HALL, LAMB, HALL & LETO, P.A., Miami, Florida, for Appellees/Cross-Appellants. Lewis Yelin, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus United States of America.

ON BRIEF: Nicole Erb, Claire A. DeLelle, WHITE & CASE LLP, Washington, D.C., for Appellant/Cross-Appellant. Nelson M. Jones III, Houston, Texas; Kevin E. Martingayle, STALLINGS & BISCHOFF, P.C., Virginia Beach, Virginia; Roarke Maxwell, HALL, LAMB, HALL & LETO, P.A., Miami, Florida, for Appellees/Cross-Appellants. Chad A. Readler, Acting Assistant Attorney General, Sharon Swingle, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Richard C. Visek, Acting Legal Adviser, UNITED STATES DEPARTMENT OF STATE, Washington, D.C.; Dana J. Boente, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Amicus United States of America.

AGEE, *Circuit Judge*:

For over a decade, family members of United States sailors killed in the bombing of the *U.S.S. Cole* have pursued litigation in federal court against the Republic of Sudan for its alleged support of Al Qaeda, which was responsible for the bombing. This appeal arises from the latest suit wherein the district court denied Sudan's motion to vacate the default judgments entered against it. Because the Appellees' method of serving process did not comport with the statutory requirements of 28 U.S.C. § 1608(a)(3), we hold the district court lacked personal jurisdiction over Sudan. Accordingly, we reverse the district court's order denying Sudan's motion to vacate, vacate the judgments, and remand with instructions.

I.

On October 12, 2000, Al Qaeda bombed the *U.S.S. Cole*, a United States Navy guided-missile destroyer, as it was refueling in the Port of Aden in Yemen. Seventeen American sailors were killed and forty-two more were injured.

A.

In 2004, family members of the deceased sailors filed a complaint against Sudan in the United States District Court for the Eastern District of Virginia ("the *Rux* litigation").[1] Although foreign states

[1] This summary of the *Rux* litigation is drawn from *Rux v. Republic of Sudan*, 410 F. App'x 581 (4th Cir. 2011); *Rux v. Republic of the Sudan*, 2009 WL 9057606 (4th Cir. July 4, 2009); and *Rux v. Republic of Sudan*, 461 F.3d 461 (4th Cir. 2006). The judgments entered in the *Rux* litigation are final and unaffected

generally enjoy immunity from suit in federal courts, 28 U.S.C. § 1604, the Foreign Sovereign Immunity Act ("FSIA") authorizes suits against a foreign state that has provided material support for certain acts of terrorism ("the terrorism exception"). Under the version of the FSIA in effect in 2004, the terrorism exception gave federal courts jurisdiction over the foreign state, but any claims had to be grounded in another substantive area of the law. *See* 28 U.S.C. § 1605(a)(7) (repealed 2008). Accordingly, the *Rux* plaintiffs' substantive claims rested on violations of the Death on the High Seas Act. With limited exceptions, Sudan did not enter appearances or otherwise defend the *Rux* suit. Following a series of rulings and appeals that are not relevant to this appeal, the district court held that Sudan was liable and awarded compensatory damages to the plaintiffs. The *Rux* plaintiffs appealed the district court's denial of their claim for additional damages. During the pendency of that appeal, Congress passed the National Defense Authorization Act for Fiscal Year 2008 ("NDAA"), Pub. L. No. 110–181, § 1083(b)(1)(A)(iii), 122 Stat. 341.

The NDAA, which became effective on January 28, 2008, repealed the prior FSIA terrorism exception to foreign state immunity, reenacted the exception's immunity-stripping language, and created a new substantive cause of action under the FSIA that authorizes recovery of noneconomic damages, including solatium and punitive damages. *See* NDAA,

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by the appeal currently before the Court. We summarize what occurred to provide context for the current lawsuit.

Pub. L. No. 110-181, § 1083 (codified at 28 U.S.C. § 1605A). The FSIA's new cause of action also specifically authorizes suit based on certain pre-enactment events so long as delineated criteria are satisfied. § 1605A(b). We granted the *Rux* plaintiffs' motion to remand for further proceedings in the district court in light of the revised statutory framework. *Rux*, 2009 WL 9057606 at *1.

On remand, the *Rux* plaintiffs sought leave to supplement their complaint to include a claim for noneconomic damages under § 1605A(c). The district court denied the motion and the *Rux* plaintiffs again appealed. While that appeal was pending, the *Rux* plaintiffs and four new plaintiffs filed "a new, related action pursuant to 28 U.S.C. § 1605A in the [United States District Court for the] Eastern District of Virginia." *Rux*, 410 F. App'x at 582. In relevant part, we held that the filing of this new complaint rendered moot the *Rux* plaintiffs' arguments and we dismissed that appeal. *Rux*, 510 F. App'x at 586.

B.

The current appeal arises from the district court's adjudication of that "new, related action" brought under the amended FSIA.[2] Kumar filed the current

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[2] The plaintiffs in this case consist of both the original *Rux* plaintiffs and several new plaintiffs. For purposes of this appeal, this factual difference is of no consequence and they stand on the same legal footing. We refer to the plaintiffs collectively as "Kumar," one of the named plaintiffs.

After Kumar first filed the § 1605A-based complaint, the district court sua sponte concluded that res judicata barred the *Rux* plaintiffs' claims and denied Kumar's motion for entry of default. On appeal, we reversed and remanded the case for

complaint in April 2010, alleging that Sudan's conduct satisfied the immunity-stripping language of § 1605A(a)(1) and caused the death of the seventeen sailors killed on board the *U.S.S. Cole*, in violation of the FSIA's new cause of action, § 1605A(c). He sought solatium and punitive damages.

In an effort to effectuate service of process pursuant to 28 U.S.C. § 1608(a)(3), the clerk of court sent the requisite documents "via certified mail, return receipt requested," in an enveloped addressed as follows:

> REPUBLIC OF SUDAN
> Serve: Deng Alor Koul,
> Minister of Foreign Affairs
> Embassy of the Republic of Sudan
> 2210 Massachusetts Avenue NW
> Washington, DC 20008

J.A. 158. Someone at the embassy accepted the envelope and signed the certified mail receipt.

Nevertheless, Sudan did not enter an appearance or file any responsive pleadings. Consequently, Kumar moved for entry of default and for the court to schedule proceedings allowing adjudication of a default judgment. Following a bench trial, the district court "found that Sudan's provision of material support and resources to al Qaeda led to the murders of the seventeen American servicemen and women serving on the *Cole*, and entered judgment against

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further proceedings, *Clodfelter v. Republic of Sudan*, 720 F.3d 199, 212 (4th Cir. 2013), which have led to the appeal now before us.

Sudan under the FSIA." J.A. 446. To more efficiently resolve the issue of damages, the court divided the suit into seventeen separate cases, each case involving all claims related to one of the seventeen deceased sailors.

In March 2015, after considering additional evidence on the alleged damages, the district court entered separate default judgment orders collectively awarding over $20 million in solatium and approximately $14 million in punitive damages to the Kumar plaintiffs.

In April 2015, just over thirty days after entry of those orders, Sudan entered an appearance and moved to vacate the default judgments under Federal Rules of Civil Procedure 55(c) and 60(b). In the alternative, Sudan requested the district court extend its time to appeal from the default judgments. In support of its motion, Sudan asserted numerous arguments challenging the district court's subject matter and personal jurisdiction, as well as the propriety of punitive damages.

The district court denied the motion to vacate, rejecting each of Sudan's contentions. It did, however, grant Sudan's motion for an extension of time to file a notice of appeal from the March 2015 default judgments. Sudan noted its appeal from both the default judgments and the denial of its post-judgment motions. In addition, Kumar noted a cross appeal challenging the district court's order extending Sudan's time to appeal. We have jurisdiction over both appeals pursuant to 28 U.S.C. § 1291.

II.

Sudan contends the district court lacked personal jurisdiction over it because Kumar did not properly effectuate service of process as required under the FSIA. Specifically, it contends that mailing service to the Sudanese embassy in Washington, D.C., does not satisfy 28 U.S.C. § 1608(a)(3) and contravenes the 1961 Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes ("Vienna Convention"), Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, which provides that a foreign state's diplomatic mission is inviolable. If the district court lacked personal jurisdiction, then the judgment against Sudan is void. *Koehler v. Dodwell*, 152 F.3d 304, 306–07 (4th Cir. 1998) ("[A]ny judgment entered against a defendant over whom the court does not have personal jurisdiction is void.").

Because the issue before us is one of statutory interpretation, we review de novo the district court's conclusion that Kumar's method of serving process satisfied § 1608(a)(3).[3] *Broughman v. Carver*, 624 F.3d 670, 674 (4th Cir. 2010).

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[3] Although Sudan appeals from both the March 2015 default judgments and the denial of its Rule 60(b) motion, our standard of review is the same in either posture given that the distilled issue before us is one of statutory interpretation: did Kumar's method of serving process comply with § 1608(a)(3)? Because Sudan prevails on this issue regardless of which decision is reviewed, we need not consider Kumar's argument on cross appeal that the district court erred in granting Sudan additional time to file its notice of appeal from the default judgments. *See United States v. Winestock*, 340 F.3d 200, 204 (4th Cir. 2003) ("District court decisions granting or denying Rule 60(b) relief are reviewed for abuse of discretion, although the exercise of

A.

The Federal Rule of Civil Procedure governing service of process provides that "[a] foreign state . . . must be served in accordance with 28 U.S.C. § 1608," *i.e.*, the FSIA. Fed. R. Civ. P. 4(j)(1). That statute, in turn, describes four methods of serving process on a foreign state, listed in hierarchical order. § 1608(a).

The first method is "in accordance with any special arrangement for service between the plaintiff and the foreign state." § 1608(a)(1). If no such arrangement exists, then service may be made "in accordance with an applicable international convention on service of judicial documents." § 1608(a)(2). And "if service cannot be made under [either of these provisions, the specified documents,] together with a translation of each into the official language of the foreign state, [can be sent] by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." § 1608(a)(3). Lastly,

> if service cannot be made within 30 days under [the third method described, then two copies of the documents, along with the requisite translation can be sent] by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of

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discretion cannot be permitted to stand if we find it rests upon an error of law.").

> Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

§ 1608(a)(4).

There is no dispute that the first two methods of service described in § 1608(a) were not available to Kumar.[4] Further, Kumar did not attempt to serve process by delivering the requisite documents through diplomatic channels as set out in subsection (a)(4), in part because failure of subsection (a)(3) service is a prerequisite to pursuing service under subsection (a)(4) and no question arose as to the validity of Kumar's method of serving process until after judgment.

The question before the Court, then, is limited to whether Kumar satisfied § 1608(a)(3), which allows service by mail "requiring a signed receipt[] to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state." Specifically, we must decide whether Kumar satisfied the "addressed and dispatched to" requirement when he submitted the packet to be mailed by the clerk of court to the Sudanese embassy in Washington, D.C. Sudan does not contest

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[4] Sudan and the United States do not have any special arrangement for serving process, and Sudan is not a signatory to the Convention on Service Abroad of Judicial and Extrajudicial Documents, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, commonly known as the Hague Service Convention.

compliance with the other components of service under subsection (a)(3) and the record shows Kumar instructed the clerk of court to send the requisite documents via the United States Postal Service's certified mail system, which is "a[] form of mail requiring a signed receipt." Consequently, our review is limited to whether delivering process to a foreign nation's embassy and identifying the head of that nation's ministry of foreign affairs as the recipient satisfies subsection (a)(3)'s requirement that the mailing is "addressed and dispatched to the head of the ministry of foreign affairs of the foreign state."

B.

As always, our duty in a case involving statutory interpretation is "to ascertain and implement the intent of Congress." *Broughman*, 624 F.3d at 674.[5] We begin with the statute's text. *Ross v. R.A. North Dev., Inc. (In re Total Realty Mgmt., LLC)*, 706 F.3d 245, 254 (4th Cir. 2013). In addition, "[t]he Supreme Court has often emphasized the crucial role of context as a tool of statutory construction. For example, the Court has stated that when construing a statute, courts must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 162 (4th Cir. 1998). As a result, "the traditional rules of statutory construction to be used in ascertaining congressional intent include: the overall statutory scheme, legislative history, the history of evolving

[5] Here, and throughout, we have omitted internal quotation marks, citations, and alterations unless otherwise noted.

congressional regulation in the area, and a consideration of other relevant statutes." *Id.*

We begin with a general observation: based on § 1608(a)'s four precise methods for service of process and how that language contrasts with § 1608(b), subsection (a) requires strict compliance. Subsection (b), which applies in suits against "an agency or instrumentality of a foreign state," contains both specific methods of serving process, § 1608(b)(1)–(2), and a catchall provision expressly allowing service by any method "reasonably calculated to give actual notice," § 1608(b)(3). Although Congress authorized an array of specific and general service options under subsection (b), it did not include a similar catchall provision in subsection (a). This contrast between two subsections of the same statute suggests that Congress intended that the four methods authorized under subsection (a) be the exclusive and explicit means of effectuating service of process against foreign states. *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). In other words, had Congress intended for a non-delineated method or actual notice to satisfy the requirements for serving process on a foreign state, it would have indicated as much by including a similar "reasonably calculated" provision in subsection (a). It did not do so.

Thus, a court cannot excuse noncompliance with the specific requirements of § 1608(a). *See Magness v.*

Russ. Federation, 247 F.3d 609, 612–617 (5th Cir. 2001) ("Based on [other decisions], the express language of section 1608(a), and the United States' interest in ensuring that the proper officials of a foreign state are notified when a suit is instituted, we hold that plaintiffs must strictly comply with the statutory service of process provisions when suing a foreign state . . . under section 1608(a)."); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 153–54 (D.C. Cir. 1994) ("We hold that strict adherence to the terms of 1608(a) is required.").[6] In short, "[l]eniency" when applying § 1608(a) "would disorder the statutory scheme" Congress enacted. *Transaero*, 30 F.3d at 154.

We now turn to what, specifically, subsection (a)(3) requires of a plaintiff. First, we note the text does not specify a geographic location for the service of process. Instead, subsection (a)(3) requires that the mailing of process be "addressed and dispatched" to the head of the ministry of foreign affairs. This phrase does not meaningfully limit the geographic location where service is to be made, though it does reinforce that the location must be related to the intended recipient. *See* address, *Oxford English Dictionary* (defining the verb "address" as "[t]o send in a particular direction or towards a particular

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[6] The Ninth Circuit has broadly stated that it has adopted "a substantial compliance test for the FSIA[]," but a review of its cases shows that it has only applied that test to a § 1608(a) service of process challenge where the plaintiff personally sent service of process rather than requesting the clerk of court to do so. *See Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1129–30 (9th Cir. 2010); *Straub v. A P Green Inc.*, 38 F.3d 448, 453–54 (9th Cir. 1994).

location" or "[t]o direct (a written communication) to a specific person or destination," "[t]o direct to the attention of, communicate to"); dispatch, *Oxford English Dictionary* (defining the verb "dispatch" as "[t]o send off post-haste or with expedition or promptitude (a messenger, message, etc., having an express destination). The word regularly used for the sending of official messengers, and messages, of couriers, troops, mails, telegrams, parcels, express trains, packet-boats, etc."). As we discuss below, our sister circuits have held that subsection (a)(3) is satisfied where process is mailed to the head of the ministry of foreign affairs at the ministry of foreign affairs' address in the foreign state. *See, e.g., Gates v. Syrian Arab Republic*, 646 F.3d 1, 4–5 (D.C. Cir. 2011); *Peterson*, 627 F.3d at 1129. But Kumar contends that subsection (a)(3)'s silence as to geographic location for the mailing means that the statute does not *require* service to be sent to the foreign state *and* that it allows service delivered to the foreign state's embassy in the United States.

Although Kumar does not advocate such an extreme position, the view that subsection (a)(3) only requires a particular recipient, and not a particular location, would allow the clerk of court to send service to *any* geographic location so long as the head of the ministry of foreign affairs of the defendant foreign state is identified as the intended recipient. That view cannot be consistent with Congress' intent: otherwise, service via General Delivery in Peoria, Illinois could be argued as sufficient.

While it is true that subsection (a)(3) does not specify delivery only at the foreign ministry in the

foreign state's capital, Kumar's premise that subsection (a)(3) does not require service to be sent there does not lead to his conclusion that service at the embassy satisfies the obligation under subsection (a)(3). The statute is simply ambiguous as to whether delivery at the foreign state's embassy meets subsection (a)(3) given that while the head of a ministry of foreign affairs generally oversees a foreign state's embassies, the foreign minister is rarely—if ever—present there. Serving the foreign minister at a location removed from where he or she actually works is at least in tension with Congress' objective, even if it is not strictly prohibited by the statutory language.

Because the plain language of subsection (a)(3) does not fully resolve the issue before us, we turn elsewhere for guidance as to Congress' intent. *See Lee v. Norfolk S. Ry. Co.*, 802 F.3d 626, 631 (4th Cir. 2015) ("[I]f the text of a statute is ambiguous, we look to other indicia of congressional intent such as the legislative history to interpret the statute."). Here, the FSIA's legislative history, coupled with the United States' obligations under the Vienna Convention, as well as the "great weight" accorded the State Department's interpretation of such foreign treaty matters, lead us to the conclusion that subsection (a)(3) is not satisfied by delivery of process to a foreign state's embassy.

To understand this interplay, we first observe the obligation under the Vienna Convention that "[t]he premises of the mission shall be inviolable. The agents of the receiving State may not enter them,

except with the consent of the head of the mission."[7] Vienna Convention, *supra* art. 22, ¶ 1. Elsewhere, the Vienna Convention protects the inviolability of diplomatic agents. *See id.* art. 29.[8]

The House Judiciary Committee Report regarding the enactment of § 1608(a) shows that the statute is meant to account for the United States' rights and obligations under the Vienna Convention. *See* H.R. Rep. No. 94–1487 (1977), *as reprinted in* 1976 U.S.C.C.A.N. 6604. The FSIA—including § 1608 in its present form—was first enacted in 1976, four years after the Vienna Convention entered into force for the United States. *See Tabion v. Mufti*, 73 F.3d 535, 538 n.5 (4th Cir. 1996). Congress knew and considered the Convention's obligations in drafting the FSIA. Specifically, the first draft of the bill allowed for service on a foreign state by "registered or certified mail . . . to the ambassador or chief of mission of the foreign state." S. 566, 93d Cong. § 1608 (2d Sess. 1973). The Department of State recommended removing that option based on its view that this

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[7] The Vienna Convention sets out certain privileges and immunities governing diplomatic relations between States, including those governing permanent diplomatic missions. The "'premises of the mission' are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission." Vienna Convention, *supra* art. 1(i).

[8] The United States is a signatory to the Vienna Convention and thus bound by its terms. *See* Vienna Convention, *supra* Presidential Proclamation ("I, Richard Nixon, President of the United States of America, proclaim and make public the Convention and the Optional Protocol to the end that they shall be observed and fulfilled with good faith on and after December 13, 1972 by the United States of America[.]").

method of service would violate Article 22 of the Vienna Convention. *See* H.R. Rep. No. 94–1487, at 26, *as reprinted in* 1976 U.S.C.C.A.N., at 6625; 71 Dep't of State Bull. 458, 458–59 (1974).

The House Report also took "[s]pecial note" of a "means . . . currently in use in attempting to commence litigation against a foreign state." H.R. Rep. No. 94–1487, at 26, *as reprinted in* 1976 U.S.C.C.A.N., at 6625. Describing "the mailing of a copy of the summons and complaint *to* a diplomatic mission of the foreign state" as a means of serving process that was "*of questionable validity*," the House Report states that "[s]ection 1608 *precludes this method* [*of service*] *so as to avoid questions of inconsistency with section 1 of article 22 of the Vienna Convention on Diplomatic Relations*[.]" *Id.* (emphases added). The Report then reiterates "[s]ervice *on* an embassy by mail would be precluded under this bill." *Id.* (emphasis added). Thus, the House Report confirms that Congress did not intend § 1608 to allow for the mailing of service "to" or "on" a diplomatic mission as such a method would transgress the treaty obligations of the United States under the Vienna Convention.

In previously interpreting other provisions of the Vienna Convention, we have recognized that it "should be construed to give effect to the intent of the signatories," considering both its language and "the context in which the words were used." *Tabion*, 73 F.3d at 537. Moreover, "[t]reaties generally are liberally construed." *Id.* The question then becomes whether the Vienna Convention's inviolability provision prohibits the application of subsection (a)(3)

in the manner that allows service of process as Kumar executed in this case: service delivered to the foreign nation's embassy in the United States. We conclude the Vienna Convention does exactly that.

Kumar contends there is a dispositive difference for purposes of subsection (a)(3) when an embassy itself is served at the embassy's address (which Kumar agrees would violate the Vienna Convention) and when the head of the ministry of foreign affairs is served at the embassy's address (which Kumar contends does not violate the Vienna Convention). We fail to discern any meaningful distinction here. In the first instance, both the embassy and its address are used in an attempt to serve the foreign state; in the second, the embassy address is used as the head of the ministry of foreign affairs' address in an attempt to serve the foreign state. In both cases, a plaintiff has relied on the foreign states' embassy as the vehicle for effectuating service of process on the foreign state. Either action impinges upon the unique characteristics of a diplomatic mission recognized and protected by the Vienna Convention and casts the embassy in the role as agent for service of process. Any distinction between service "on" the embassy or "via" the embassy thus seems a meaningless semantic distinction.[9]

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[9] The Vienna Convention allows "the head of the mission" to waive the inviolability of the premises. *See* Vienna Convention, *supra* art. 22, ¶ 1 ("The agents of the receiving State may not enter [the premises of the mission], except with the consent of the head of the mission."). Here, however, there is no evidence in the record to suggest that the Sudanese Ambassador did so. Simple acceptance of the certified mailing from the clerk of court does not demonstrate a waiver. That conclusion follows all the

In foreign affairs matters such as we consider here, we afford the view of the Department of State "substantial deference." *See Abbott v. Abbott*, 560 U.S. 1, 130 S. Ct. 1983, 1993 (2010) ("It is well settled that the Executive Branch's interpretation of a treaty is entitled to great weight."); *Tabion*, 73 F.3d at 538 ("Substantial deference is due to the State Department's conclusion" about the meaning of a treaty's provisions). This judicial deference stems in part from the Constitution's grant to the Executive Branch—not the Judicial Branch—of broad oversight over foreign affairs. *Compare* U.S. Const. art. 2, § 2, cl. 2, *and* § 3 (reserving to the Executive Branch the ability to "make Treaties" and "receive Ambassadors and other public Ministers"), *with* U.S. Const. art. 3 (containing no similar oversight of foreign affairs). In this case, the State Department contends that service at an embassy does not satisfy subsection (a)(3) and is inconsistent with the United States' obligations under the Vienna Convention. *See* Br. for the United States as Amicus Curiae in Supp. of Reversal 11 ("There is an international consensus that a litigant's service of process through mail or personal delivery to a foreign mission is inconsistent with the inviolability of the mission enshrined in" Article 22 of the Vienna Convention).

Relatedly, the Court properly considers the diplomatic interests of the United States when construing the Vienna Convention and the FSIA. *See*

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more strongly because the signature does not appear to be that of the Ambassador. Furthermore, no record document shows Sudan's Ambassador has authorized waiver as a general matter or for purposes of service in this case.

Persinger v. Islamic Republic of Iran, 729 F.2d 835, 841 (D.C. Cir. 1984) (noting that, in construing the FSIA, courts should consider the United States' interest in reciprocal treatment abroad). The United States has represented that it routinely "refuses to recognize the propriety of a private party's service through mail or personal delivery to a United States embassy." Br. for the United States as Amicus Curiae in Supp. of Reversal 13. The following example illustrates the wisdom of deferring to the State Department's interpretation in this area: As noted, citing the Vienna Convention's provisions, the Secretary of State "routinely refuses to recognize" attempts to serve process on the United States by mail sent to U.S. embassies in foreign states. *See* Br. for the United States as Amicus Curiae in Supp. of Reversal 13–14. The legitimacy and sustainability of that position would be compromised were we to countenance Kumar's method of serving process to the Sudanese embassy. Why would a foreign judiciary recognize the United States' interpretation of the Vienna Convention when it comes to rejecting service of process via its own embassies if that same method for purposes of serving process on foreign states were permitted in the United States? Clearly, the United States cannot expect to receive treatment under the Vienna Convention that its own courts do not recognize in similar circumstances involving foreign states. This dilemma is avoided by the construction of subsection (a)(3) urged by the State Department. We find its longstanding policy and interpretation of these provisions authoritative, reasoned, and entitled to great weight.

In view of the ambiguity in § 1608(a)(3) as to the place of service, we conclude the legislative history, the Vienna Convention, and the State Department's considered view to mean that the statute does not authorize delivery of service to a foreign state's embassy even if it correctly identifies the intended recipient as the head of the ministry of foreign affairs. Put another way, process is not properly "addressed and dispatched to" the head of the ministry of foreign affairs as required under § 1608(a)(3) when it is delivered to the foreign state's embassy in Washington, D.C.

We recognize that this holding adds to the existing tension between the courts of appeals' interpretations of § 1608(a)(3), but it aligns with the greater weight of those holdings. For instance, it is consistent with the approaches taken in the D.C. and Seventh Circuits. Although it has not been confronted with the precise issue raised in this case, the D.C. Circuit has suggested that § 1608(a)(3) requires service on the head of the ministry of foreign affairs in the foreign state. *See Barot v. Embassy of the Republic of Zam.*, 785 F.3d 26, 28, 30 (D.C. Cir. 2015) (noting that the district court rejected plaintiff's attempt to serve process at the Zambian Embassy "in Washington D.C., rather than at the Ministry of Foreign Affairs in Lusaka, Zambia, *as the Act required*" and remanding to the district court so the plaintiff had the opportunity "to effect service pursuant to [28 U.S.C. §] 1608(a)(3)" by having the clerk of court send service "to the head of the ministry of foreign affairs in Lusaka, Zambia, whether identified by name or title, and not to any other official or agency"). Similarly, the Seventh

Circuit observed that the Vienna Convention and § 1608 both prohibited a plaintiff from effectuating service under subsection (b)(3)'s catchall provision by serving process on a foreign company "wholly owned by the Belarusian government" by delivering it to the Belarusian ambassador at the embassy in Washington, D.C. *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 739, 749–50 (7th Cir. 2007) (holding "service *through* an embassy is expressly banned both by an international treaty to which the United States is a party and by U.S. statutory law" because the treaty prohibits service on a diplomatic officer and § 1608 does not authorize service of process on an ambassador (emphasis added)).[10]

Our holding conflicts with the view of the Second Circuit, which has held that serving Sudan's head of the ministry of foreign affairs in a package that was delivered by certified mail to the Sudanese embassy in Washington, D.C., satisfies § 1608(a)(3). *Harrison v. Republic of Sudan* (*Harrison I*), 802 F.3d 399, 402–06 (2d Cir. 2015), *reh'g denied*, 838 F.3d 86 (*Harrison II*) (2d Cir. 2016) (denying petition for rehearing following further briefing and argument, and

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[10] The United States contends the Fifth Circuit has also taken this view of § 1608(a)(3). But the facts of *Magness* bear little relation to what occurred here. There, the plaintiffs attempted to serve process by sending the "complaint to the Texas Secretary of State for forwarding to Boris Yeltsin" and "directly to the Russian Deputy Minister of Culture." *Magness*, 247 F.3d at 613. The plaintiffs in *Magness* never attempted to serve process "through the Ministry of Foreign Affairs," *id.*, but the Fifth Circuit did not address the physical location where such service could be sent.

elaborating on the reasons for affirmance). The Second Circuit concluded "principles of mission inviolability and diplomatic immunity are [not] implicated" where service is made "*via* the embassy address." *Harrison I*, 802 F.3d at 405; *see also Harrison II*, 838 F.3d at 94 (distinguishing between service "on the Minister of Foreign Affairs at the foreign mission" and service "on the foreign mission itself or the ambassador"). For the reasons we've already explained, we find the Second Circuit's reasoning weak and unconvincing.[11] [12]

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[11] The distinction Kumar advances, and accepted by the Second Circuit in *Harrison*, rests on the artificial, non-textual distinction between service "on" the embassy and "via" the embassy. As noted earlier, we find no such distinction for purposes of subsection (a)(3). In both cases, the embassy is the de facto agent for service of process, something the Vienna Convention does not allow absent a waiver of mission inviolability. Further, although the Second Circuit acknowledged the State Department's view is to be afforded "great weight," *Harrison* II, 838 F.3d at 95, it summarily rejected that position, which seems to accord the State Department's view no weight at all. In contrast, the position we adopt in this case respects the "great weight" the State Department's view merits.

[12] A petition for certiorari in *Harrison* is currently pending before the Supreme Court, and the question presented squarely raises the issue of whether subsection (a)(3) and the Vienna Convention allow service of process "by mail addressed and dispatched to the head of the foreign state's ministry of foreign affairs 'via' or in 'care of' the foreign state's diplomatic mission in the United States." Pet. for a Writ of Cert. at i, *Republic of Sudan v. Harrison*, No. 16-1094 (U.S. Mar. 9, 2017). Shortly before we heard oral argument in this case, the Supreme Court invited the Solicitor General to file a brief expressing the views of the United States. *Republic of Sudan v. Harrison*, 138 S. Ct.

Several additional grounds the Second Circuit relied on merit brief discussion as well. First, after acknowledging § 1608(a)(3)'s silence as to geographic location, the court noted that "[i]f Congress had wanted to require that the mailing be sent to the head of the ministry of foreign affairs in the foreign country, it could have said so. In § 1608(a)(4), for example, Congress specified that the papers be mailed to the Secretary of State in *Washington, District of Columbia*[.]" *Harrison I*, 802 F.3d at 404; *accord Harrison II*, 838 F.3d at 91 ("If Congress had wanted to require that the mailing be sent to the minister of foreign affairs at the principal office of the ministry in the foreign country, it could have said so—but it did not."). We do not find this point to be persuasive given that subsection (a)(4) directs attention to one known location for one country—the United States—and so can be easily identified. *See* 28 U.S.C. § 1608(a)(4).

Second, the Second Circuit observed that requiring process "to a ministry of foreign affairs in the foreign country, makes little sense from a reliability perspective and as a matter of policy" given the reliability of a diplomatic pouch. *Harrison I*, 802 F.3d at 406; *accord Harrison II*, 838 F.3d at 90 & n.3 (approving of service on an embassy because such service "could reasonably be expected to result in delivery to the intended person," as the embassy "is the nerve center for a country's diplomatic affairs within the borders of another nation"). This misses

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293 (2017) (mem.). At present, the Solicitor General has not filed its brief.

the mark for multiple reasons. Reliability and policy concerns have no role when considering what the text of the statute—construed in light of the Vienna Convention—means. Subsection (a)(3) requires plaintiffs to attempt service by mail "requiring a signed receipt," but leaves the specific use of certified mail or other method open to take into account concerns about reliability of service on a particular foreign state. Moreover, § 1608(a) specifically contemplates that service via subsection (a)(3) may not be possible in every foreign state, as recognized by subsection (a)(4), which allows for service under the alternative of using diplomatic channels. If, after thirty days, a plaintiff is unable to effectuate service pursuant to subsection (a)(3), he or she can turn to subsection (a)(4). *That* is the subsection that Congress intended plaintiffs to use to take advantage of the reliability and security of the diplomatic pouch.

Further, the method to effectuate service of process the United States undertakes does not violate the Vienna Convention because it respects international norms of communication via diplomatic channels. *See* Oct. 26, 2017, Letter from the United States as Amicus Curiae 1–2 ("When transmitting legal process through diplomatic channels, the State Department's typical practice is for the United States' embassy in the foreign state to deliver the papers to the state's foreign ministry. In some unusual circumstances, or if the foreign state so requests, the State Department will transmit process to a foreign state's embassy in the United States. In either case, the State Department transmits the papers under cover of a diplomatic note to the foreign state. . . . [T]his *transmission of legal papers from one*

executive to another is considered to be communication through diplomatic channels." (emphasis added)). Certified mail sent from the clerk of court to the head of the ministry of foreign affairs at the foreign state's embassy is not of the same level and protocol and does not similarly respect the inviolability of the embassy for purposes of complying with the Vienna Convention.

III.

Because the attempted service of process in this case did not comply with the FSIA's statutory requirements, the district court lacked personal jurisdiction over Sudan and could not enter judgment against it. *See* 28 U.S.C. § 1330(b) ("Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction . . . where service has been made under [28 U.S.C. § 1608(a)]."); *see also Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) ("Personal jurisdiction . . . is an essential element of the jurisdiction of a district court, without which the court is powerless to proceed to an adjudication."). For that reason, the judgments entered against Sudan are void.

We therefore reverse the district court's denial of Sudan's motion to vacate the entry of judgment, vacate the judgments against it, and remand to the district court with instructions to allow Kumar the opportunity to perfect service of process in a manner consistent with this opinion.

REVERSED IN PART,
VACATED IN PART,
AND REMANDED WITH INSTRUCTIONS

No. 16-1094

In the Supreme Court of the United States

REPUBLIC OF SUDAN, PETITIONER

v.

RICK HARRISON, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, provides four hierarchical and exclusive means for a litigant in the courts of the United States to serve a foreign state. 28 U.S.C. 1608(a)(1)-(4). The third means, in Section 1608(a)(3), provides for "a copy of the summons and complaint and a notice of suit * * * to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. 1608(a)(3).

The question presented is whether service under Section 1608(a)(3) may be accomplished by requesting that the clerk mail the service package to the embassy of the foreign state in the United States, if the papers are directed to the minister of foreign affairs, or whether Section 1608(a)(3) requires that process be mailed to the ministry of foreign affairs in the country concerned.

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In the Supreme Court of the United States

No. 16-1094

REPUBLIC OF SUDAN, PETITIONER

v.

RICK HARRISON, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case concerns the proper means of effecting service in an action against a foreign state under the Foreign Sovereign Immunities Act of 1976 (FSIA or Act), 28 U.S.C. 1330, 1441(d), 1602 *et seq.* See 28 U.S.C. 1608(a)(3). Litigation against foreign states in U.S. courts can have significant foreign affairs implications for the United States, and can affect the reciprocal treatment of the United States in the courts of other nations. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

Although the United States agrees with petitioner that the court of appeals incorrectly resolved the question presented in this case, the United States deeply sympathizes with the extraordinary injuries suffered by respondents, and it condemns in the strongest possible terms the terrorist acts that caused those injuries. The

United States remains committed to opposing and deterring state-sponsored terrorism and to supporting appropriate recoveries for U.S. victims.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-6a.

STATEMENT

1. The FSIA provides the sole basis for civil suits against foreign states and their agencies or instrumentalities in United States courts. See, *e.g.*, *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-435 & n.3 (1989). The FSIA establishes that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided" by the Act and "existing international agreements to which the United States [was] a party at the time of [its] enactment." 28 U.S.C. 1604; see *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993); *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488-489 (1983). If a suit comes within a statutory exception to foreign sovereign immunity, the FSIA provides for subject-matter jurisdiction in district courts, 28 U.S.C. 1330(a), as well as for personal jurisdiction over the foreign state "where service has been made under section 1608," 28 U.S.C. 1330(b).

Section 1608(a) provides the exclusive means for serving "a foreign state or political subdivision of a foreign state" in civil litigation. 28 U.S.C. 1608(a); see Fed. R. Civ. P. 4(j)(1). The provision specifies four exclusive methods of service, in hierarchical order. See, *e.g.*, J.A. 176; *Magness* v. *Russian Fed'n*, 247 F.3d 609, 613 (5th Cir.), cert. denied, 534 U.S. 892 (2001). First, service shall be made on a foreign state "in accordance with any special arrangement for service between the plaintiff

and the foreign state or political subdivision." 28 U.S.C. 1608(a)(1). Second, if no such special arrangement exists, service shall be made "in accordance with an applicable international convention on service of judicial documents." 28 U.S.C. 1608(a)(2). Third, if no such international convention applies, service shall be made

> by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.

28 U.S.C. 1608(a)(3). Fourth, if service cannot be made within thirty days under Section 1608(a)(3), service shall be made by mailing by the clerk of the court to the State Department for service "through diplomatic channels to the foreign state." 28 U.S.C. 1608(a)(4).

2. On October 12, 2000, terrorists bombed the USS *Cole* in the Port of Aden, Yemen. J.A. 84. Seventeen U.S. service members were killed and 42 others were injured. *Ibid.* In 2010, the individual respondents, who are sailors and spouses of sailors injured in the bombing, sued petitioner, the Republic of Sudan, in the District Court for the District of Columbia. Pet. 8. Respondents relied on the cause of action set forth in 28 U.S.C. 1605A, which is available in certain actions against designated state sponsors of terrorism such as the Republic of Sudan. Respondents alleged that petitioner provided material support to the al Qaeda operatives who carried out the bombing. Pet. 8; J.A. 170.

Respondents could not serve petitioner under Section 1608(a)'s first two methods of service. Respondents had no "special arrangement" with petitioner for service,

see 28 U.S.C. 1608(a)(1), and petitioner is not a party to the Convention on Service Abroad of Judicial and Extrajudicial Documents, *done* Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638; see *Kumar* v. *Republic of Sudan*, 880 F.3d 144, 153 n.4 (4th Cir. 2018), petition for cert. pending, No. 17-1269 (filed Mar. 9, 2018); 28 U.S.C. 1608(a)(2). Respondents therefore attempted to serve petitioner under Section 1608(a)(3). J.A. 171-172, 177. They requested that the clerk of the court mail a copy of the summons and complaint via registered mail, return receipt requested, to:

> Republic of Sudan
> Deng Alor Koul
> Minister of Foreign Affairs
> Embassy of the Republic of Sudan
> 2210 Massachusetts Avenue NW
> Washington, DC 20008

J.A. 172 (citation omitted). The clerk did so on November 17, 2010, and the court received a signed receipt on November 23, 2010. J.A. 73-74.

Petitioner did not respond within 60 days of the signed receipt, as required by 28 U.S.C. 1608(c) and (d). Following a hearing, the district court entered a default judgment against petitioner. J.A. 81-83. The court determined that service on petitioner was proper, J.A. 88, and that it had jurisdiction under Section 1605A(a), J.A. 89-127. The court then concluded that respondents had established petitioner's liability under Sections 1605A and 1606, and it awarded respondents $314.7 million in damages. J.A. 81-83, 127-139. Respondents attempted to serve the default judgment on petitioner by the same delivery method—through the clerk's mailing of the papers to the Embassy of the Republic of Sudan in Washington, D.C., in a package directed to the minister of

foreign affairs. J.A. 173; see 28 U.S.C. 1608(e) (requiring service of any default judgment in the manner prescribed for service of the summons and complaint).

3. Respondents registered the default judgment in the District Court for the Southern District of New York. J.A. 173. Both that court and the District Court for the District of Columbia determined that respondents had effected service of the default judgment and that respondents could seek attachment and execution of the judgment. J.A. 173-174; see 28 U.S.C. 1610(c).

Respondents then filed three petitions in the Southern District of New York seeking turnover of assets of petitioner's agencies and instrumentalities held by respondent banks Mashreqbank PSC, BNP Paribas, and Credit Agricole Corporate and Investment Bank—assets that had been frozen pursuant to the Sudanese Sanctions Regulations, 31 C.F.R. Pt. 538. J.A. 174; see Fed. R. Civ. P. 69(a). Respondents again attempted to serve the relevant papers on Sudan by mailing them to the Embassy of the Republic of Sudan in Washington, D.C., in a package directed to the Minister of Foreign Affairs. J.A. 174. The district court granted respondents' petitions and issued three turnover orders against the banks in partial satisfaction of the default judgment. J.A. 149-164.

Petitioner then entered an appearance in the Southern District of New York and timely appealed the issuance of the turnover orders. J.A. 174.[1]

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[1] While that appeal was pending, petitioner entered an appearance in the litigation in the District Court for the District of Columbia and moved to vacate the default judgment under Federal Rule of Civil Procedure 60(b). That motion remains pending. Pet. 11; J.A. 211 n.1; see 10-cv-1689 D. Ct. Doc. 55 (June 14, 2015).

4. The court of appeals affirmed. J.A. 168-189. It concluded that respondents had properly effected service under Section 1608(a)(3) in the original action. J.A. 175-184. The court held that service under Section 1608(a)(3), which requires that process be "addressed and dispatched * * * to the head of the ministry of foreign affairs of the foreign state concerned," 28 U.S.C. 1608(a)(3), could be accomplished by providing for delivery to the "minister of foreign affairs via an embassy address." J.A. 179. According to the court, Section 1608(a)(3) did not require that service be made on the Minister of Foreign Affairs of Sudan at the Ministry of Foreign Affairs in Khartoum, Sudan, because the statute does not expressly state that process must "be mailed to a location in the foreign state," and respondents' method of service "could reasonably be expected to result in delivery to the intended person." *Ibid.*; see J.A. 182 (stating that mailing process to the embassy "makes * * * sense from a reliability perspective and as a matter of policy").

The court of appeals recognized that the FSIA's legislative history "seemed to contemplate—and reject—service on an embassy," in order to "prevent any inconsistency with the Vienna Convention on Diplomatic Relations," which provides that "'[t]he premises of the [diplomatic] mission shall be inviolable.'" J.A. 181-182 (citation omitted; brackets in original). But the court distinguished "'service *on* an embassy'" from "service on a minister of foreign affairs *via* or *care of* an embassy," which the court concluded was permissible and did not implicate "principles of mission inviolability and diplomatic immunity." J.A. 181-183 (brackets and citation omitted). Having concluded that respondents' initial service was proper, the court determined that respondents'

service of the default judgment and all post-judgment motions was proper as well. J.A. 183-184.

5. Following additional briefing and argument in which the United States participated, see J.A. 192-206, the court of appeals denied petitioner's motion for panel rehearing. J.A. 212. Although the court "acknowledge[d]" that the issue "presents a close call," J.A. 213, it adhered to its prior conclusion that Section 1608(a)(3) permitted respondents to serve petitioner by requesting that the clerk mail papers "to the minister of foreign affairs via Sudan's embassy in Washington, D.C.," because the statute "does not specify that the mailing be sent to the head of the ministry of foreign affairs *in* the foreign country," J.A. 214. The court reiterated its view that respondents' method of service "could reasonably be expected to result in delivery to the intended person." *Ibid.* And it again stated that although Section 1608(a)(3) does not permit service "'*on*'" an embassy, "[t]he legislative history does not address * * * whether Congress intended to permit the mailing of service to a foreign minister via an embassy." J.A. 218 (citation omitted).

For similar reasons, the court rejected, "with some reluctance," the United States' argument that the court's interpretation of Section 1608(a)(3) contravenes the Vienna Convention on Diplomatic Relations (VCDR), *done* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. J.A. 225; see J.A. 220-225. In the court's view, "service on an embassy or consular official would be improper" under the VCDR, but service with papers "addressed to the Minister of Foreign Affairs via the embassy," conforms to the Convention's requirements. J.A. 222. In addition, while the United States had noted that it "consistently rejects attempted service via direct delivery to a U.S.

embassy abroad" because it believes such service to be inconsistent with international law, the court stated that its rule would "not preclude the United States (or any other country) from enforcing a policy of refusing to accept service via its embassies." *Ibid.* (citation omitted). Finally, the court opined that "the Sudanese Embassy's acceptance of the service package surely constituted 'consent'" for purposes of the VCDR. J.A. 223.

The court of appeals denied rehearing en banc. J.A. 231-232.

SUMMARY OF ARGUMENT

The court of appeals held that the Foreign Sovereign Immunities Act (FSIA or Act), 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, permits service on a foreign state to be effected by sending service papers, directed to the head of the ministry of foreign affairs, to the foreign state's embassy in the United States. J.A. 178-183, 213-225; see 28 U.S.C. 1608(a)(3). That holding contravenes the most natural reading of the statutory text, the United States' treaty obligations, and the FSIA's legislative history. It also threatens harm to the United States' foreign relations and reciprocal treatment in courts abroad. When properly construed, Section 1608(a)(3) requires that the clerk of court send service documents to the ministry of foreign affairs at the foreign state's seat of government.

A. 1. Section 1608(a) provides four exclusive, hierarchical methods for serving a foreign state in litigation in the United States. The third method of service, at issue here, provides for "sending a copy" of the relevant documents "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. 1608(a)(3). The most

natural understanding of that text is that it requires the clerk both to mark the foreign minister's name or title on the package, and to send it to that individual at his principal place of performing his official duties—the foreign ministry at the foreign state's seat of government.

By contrast, had Congress intended to permit service to be made "via" or in "care of" the foreign state's embassy in the United States, as the court of appeals held, it would have provided for service on the ambassador, or through an agent. Indeed, a neighboring provision, Section 1608(b)(2), expressly provides for service on an agent. Congress's failure to include similar language in Section 1608(a) confirms that it did not intend for embassy personnel to function as de facto agents for forwarding service of process to the head of the ministry of foreign affairs.

2. The court of appeals erred in construing Section 1608(a)(3) to be satisfied by mailing the service package to an embassy. The court stated that such a mailing complied with Section 1608(a)(3) because it "could reasonably be expected to result in delivery to the intended person" and the embassy was a "logical" location for service. J.A. 214 & n.3. But the statutory text refutes the court's imposition of an actual-notice or reasonable-likelihood standard. Unlike Section 1608(a)(3), Section 1608(b)(3) expressly permits service by certain methods "if reasonably calculated to give actual notice." 28 U.S.C. 1608(b)(3). Moreover, the court of appeals' reasoning incorrectly assumes—contrary to Section 1608(a)'s four hierarchical methods of service—that service under Section 1608(a)(3) should be available in most circumstances.

B. The best reading of the statutory text is reinforced by the United States' treaty obligations and diplomatic interests.

1. Article 22(1) of the Vienna Convention on Diplomatic Relations (VCDR), *done* Apr. 18, 1961, 23 U.S.T. 3227, 3237, 500 U.N.T.S. 95, 106, to which the United States is a party, provides that "[t]he premises of" a foreign state's "mission shall be inviolable," and "[t]he agents of the receiving State may not enter them, except with the consent of the head of the mission." The Executive Branch has long interpreted Article 22 and the principle of mission inviolability it codifies to prohibit service on an embassy by mail. That interpretation is shared by other countries and leading commentators, and it is supported by the Convention's drafting history.

2. Failing to protect mission inviolability within the United States would risk harm to the United States' foreign relations. The United States has substantial diplomatic interests in ensuring that foreign states need not appear in domestic courts unless and until they are properly served under the FSIA, in a manner consistent with the United States' treaty obligations. The United States also has a significant interest in receiving reciprocal treatment in courts abroad. At present, the United States routinely refuses to recognize the propriety of service through mail or personal delivery by a private party or foreign court to a United States embassy, even if a mail clerk at the embassy has signed for the package. The rule adopted by the court of appeals threatens the United States' continued ability to successfully assert that it has not been properly served in these instances.

3. The court of appeals agreed that the VCDR prohibits service "on" an embassy, but it concluded that service "via" the embassy does not contravene the Convention. That distinction does not withstand scrutiny. In either case, sending service documents to the

embassy violates mission inviolability as recognized by Article 22 of the VCDR. Nor was the court of appeals correct that the embassy here "consented" to service consistent with the VCDR, for the VCDR provides that only the head of the mission can consent to an intrusion upon inviolability. Nor was the onus on embassy personnel to reject service.

C. Finally, the legislative history of the FSIA confirms that service under Section 1608(a)(3) requires sending the service package to the head of the foreign ministry in the country concerned. Congress considered and rejected statutory language that would have permitted service on ambassadors because of concerns that such service would violate the VCDR. The House Report accompanying the bill that became the FSIA likewise criticized attempts at service by mailing documents "to" an embassy and stated that such service would not be permitted under the Act. And the Federal Rule of Civil Procedure on which Section 1608(a)(3) was patterned, as well as statements at congressional hearings, confirm that Congress expected for service under that provision to occur abroad.

ARGUMENT

SECTION 1608(a)(3) DOES NOT PERMIT SERVICE ON A FOREIGN STATE BY MAILING PROCESS DIRECTED TO THE FOREIGN MINISTER TO THE FOREIGN STATE'S EMBASSY IN THE UNITED STATES

A. The Text Of Section 1608(a)(3) Is Best Read To Require That Service Be Mailed To The Ministry Of Foreign Affairs In The Country Concerned

1. a. Prior to 1976, there was "no statutory procedure for service of process by which [a litigant could]

obtain personal jurisdiction over foreign states." *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 14 (1973) (Statement of Hon. Charles N. Brower, Legal Advisor, Dep't of State). That changed in 1976, when Congress enacted the Foreign Sovereign Immunities Act.

The FSIA is a "comprehensive statute containing a 'set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.'" *Republic of Austria* v. *Altmann*, 541 U.S. 677, 691 (2004) (quoting *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983)). Under the FSIA, "a foreign state is presumptively immune from the jurisdiction of United States courts." *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993); see H.R. Rep. No. 1487, 94th Cong., 2d Sess. 17 (1976) (House Report). "[A] federal court lacks subject-matter jurisdiction over a claim against a foreign state" unless "a specified exception applies." *Nelson*, 507 U.S. at 355; see 28 U.S.C. 1330(a), 1604. And personal jurisdiction over the foreign state exists only where the requirements for subject matter jurisdiction are met and "service has been made under section 1608." 28 U.S.C. 1330(b); see *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 435 n.3 (1989); *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981) (the FSIA "makes the statutory aspect of personal jurisdiction simple: subject matter jurisdiction plus service of process equals personal jurisdiction"), cert. denied, 454 U.S. 1148 (1982).

b. Section 1608(a) provides four exclusive, hierarchical means for serving "a foreign state or political subdivision of a foreign state" in civil litigation. 28 U.S.C. 1608(a). The provision at issue here, Section 1608(a)(3), permits a litigant to serve a foreign state

> by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.

28 U.S.C. 1608(a)(3).

The most natural understanding of the text of Section 1608(a)(3) is that it requires that the service package be mailed to the ministry of foreign affairs at the foreign state's seat of government. The statute mandates that service be "addressed and dispatched * * * to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. 1608(a)(3). The clerk of court therefore must both "address" the service papers to the head of the ministry of foreign affairs *and* "dispatch" the service package to that individual by sending it to him. See *Webster's Third New International Dictionary* 24, 653 (1966) (defining "address" as "to write or otherwise mark directions for delivery on," and "dispatch" as "to send off or away * * * with promptness or speed often as a matter of official business"); see also *Kumar* v. *Republic of Sudan*, 880 F.3d 144, 155 (4th Cir. 2018), petition for cert. pending, No. 17-1269 (filed Mar. 9, 2018) (statutory language "reinforce[s] that the location [for delivery of service] must be related to the intended recipient," *i.e.*, the minister of foreign affairs). A state's foreign minister does not

work in the state's embassies throughout the world and "is rarely—if ever—present" in those locations. *Kumar*, 880 F.3d at 155. Thus, one would not naturally say that service papers mailed to the foreign state's embassy in the United States have been "addressed and dispatched * * * to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. 1608(a)(3). And no other statutory language suggests that Congress expected foreign ministers to be served at locations removed from their principal place of performance of their official duties.

The best reading of the statutory text is therefore that delivery must be made to the minister of foreign affairs at his principal place of business—the ministry of foreign affairs in the foreign state's seat of government. And indeed, that is precisely how courts have interpreted the statute, albeit in cases that did not involve respondents' particular method of service. See *Barot* v. *Embassy of The Republic of Zambia*, 785 F.3d 26, 30 (D.C. Cir. 2015) (Section 1608(a)(3) "requires" "sen[ding]" the papers "to the 'head of the ministry of foreign affairs' in Lusaka, Zambia, whether identified by name or title, and not to any other official or agency."); *Transaero, Inc.* v. *La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994) (Section 1608(a)(3) "mandates service of the Ministry of Foreign Affairs."), cert. denied, 513 U.S. 1150 (1995); see also *Gates* v. *Syrian Arab Republic*, 646 F.3d 1, 4 (D.C. Cir.) (no dispute that litigants complied with Section 1608(a)(3) by addressing service to the Syrian Ministry of Foreign Affairs), cert. denied, 565 U.S. 945 (2011). Cf. *Kumar*, 880 F.3d at 155 ("Serving the foreign minister at a location removed from where he or she actually works is at least in tension with Congress' objective, even if it is not strictly prohibited

by the statutory language"). The State Department also has long interpreted Section 1608(a)(3) to require the clerk of court to send service documents "directly to the ministry of foreign affairs of the defendant sovereign state." *Sovereign Immunity: Foreign Sovereign Immunities Act: Service of Process upon a Foreign State*, 1979 Digest ch. 6, § 7, at 894 (quoting State Department message to "all diplomatic and consular posts, sent May 15, 1979").

c. If Congress had intended to permit service on a foreign state "via" its embassy in the United States, as the court of appeals held, *e.g.*, J.A. 216, it would have provided that service be dispatched to the foreign state's ambassador, or to an agent, rather than "addressed and dispatched * * * to the head of the ministry of foreign affairs." 28 U.S.C. 1608(a)(3). As the court below agreed, however, and as other courts have held, service on an embassy or an ambassador is improper under the statute. See J.A. 222; *Autotech Techs. LP* v. *Integral Research & Dev. Corp.*, 499 F.3d 737, 748 (7th Cir. 2007) ("[S]ervice through an embassy is expressly banned * * * by U.S. statutory law."), cert. denied, 552 U.S. 1231 (2008); *Alberti* v. *Empresa Nicaraguense De La Carne*, 705 F.2d 250, 253 (7th Cir. 1983) (service on ambassador is "simply inadequate" under Section 1608(a)(3)).

Nor does the statutory text suggest that Congress intended for embassy personnel to function as "de facto agent[s]" for forwarding "service of process" under Section 1608(a)(3). *Kumar*, 880 F.3d at 159 n.11. The neighboring provision of the FSIA, Section 1608(b)—which governs service on an agency or instrumentality of a foreign state—expressly provides for service by delivery to an "officer, a managing or general agent, or to any other agent authorized by appointment or by law

to receive service of process in the United States." 28 U.S.C. 1608(b)(2). Congress's failure to include similar language in Section 1608(a) underscores that Congress did not envision that service would be sent to a foreign state's embassy for forwarding to the head of the ministry of foreign affairs. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets and citation omitted); see also *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'") (quoting *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989)).[2]

2. The court of appeals was thus wrong to suggest that Section 1608(a)(3) "is silent as to a specific location

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[2] Section 1608(c), which governs the time when service shall be deemed to have been made, further supports the conclusion that Congress did not intend for service to be made "via" the foreign state's embassy in the United States. Section 1608(c)(2) deems service to have been made under Section 1608(a)(3) on the date of receipt of the signed and returned postal receipt. 28 U.S.C. 1608(c)(2). By contrast, where Congress expected for service to be transmitted via an intermediary—the Secretary of State under Section 1608(a)(4)—it provided for service to be deemed complete when actually transmitted to the minister of foreign affairs. 28 U.S.C. 1608(c)(1). Had Congress intended to allow service under Section 1608(a)(3) to be made "via" the foreign state's embassy in the United States, it likely would have similarly provided that service under that provision be deemed complete when transmitted by the embassy to the foreign minister.

where the mailing is to be addressed." J.A. 178; see J.A. 213. Instead, the text of Section 1608(a)(3) and surrounding provisions indicate that service must be sent to the ministry of foreign affairs in the country concerned. In any event, the court of appeals drew incorrect inferences from what it interpreted to be statutory silence.

a. The court of appeals first contrasted Section 1608(a)(3) with Section 1608(a)(4), which requires the clerk of court to mail papers "to the Secretary of State *in Washington, District of Columbia*." J.A. 215; see J.A. 175-177. As the Fourth Circuit explained in rejecting respondents' method of service in *Kumar*, however, reliance on Section 1608(a)(4) to interpret Section 1608(a)(3) is unpersuasive. Section 1608(a)(3) directs attention to locations in many countries—"to the head of the ministry of foreign affairs of the foreign state concerned." Section 1608(a)(4), by contrast, "directs attention to one known location for one country—the United States—and so can be easily identified." *Kumar*, 880 F.3d at 159.

b. The court of appeals also expressed the view that "[a] mailing addressed to the minister of foreign affairs via Sudan's embassy in Washington, D.C." complied with Section 1608(a)(3) because it "could reasonably be expected to result in delivery to the intended person," J.A. 214, and "makes * * * sense from a reliability perspective and as a matter of policy," J.A. 182. The court thus construed Section 1608(a)(3) to effectively include an actual-notice standard that it believed was satisfied because "[a]n embassy is a logical place to direct a communication intended to reach a foreign country." J.A. 214 n.3.

The court of appeals' rationale is unpersuasive. Where Congress envisioned a reasonable-efforts or actual-notice

standard for service under the FSIA, it said so expressly. Section 1608(b), governing service on an agency or instrumentality, contains a "catchall provision," *Kumar*, 880 F.3d at 154, that permits service by certain methods "if reasonably calculated to give actual notice," 28 U.S.C. 1608(b)(3). Section 1608(b) is therefore "concerned with substance rather than form," *Transaero*, 30 F.3d at 154, and the courts of appeals have "generally h[e]ld" that it "may be satisfied by technically faulty service that gives adequate notice to the foreign state." *Id.* at 153; see, *e.g.*, *First City, Texas-Houston, N.A.* v. *Rafidain Bank*, 281 F.3d 48, 54 (2d Cir.), cert. denied, 537 U.S. 813 (2002); *Magness* v. *Russian Fed'n*, 247 F.3d 609, 616 (5th Cir.), cert. denied, 534 U.S. 892 (2001); *Straub* v. *A P Green, Inc.*, 38 F.3d 448, 453 (9th Cir. 1994); *Sherer* v. *Construcciones Aeronauticas*, 987 F.2d 1246, 1250 (6th Cir.), cert. denied, 510 U.S. 818 (1993); *Harris Corp.* v. *National Iranian Radio & Television*, 691 F.2d 1344, 1352 (11th Cir. 1982); *Velidor* v. *L/P/G Benghazi*, 653 F.2d 812, 821 (3d Cir. 1981), cert. dismissed, 455 U.S. 929 (1982). But Section 1608(a) contains no similar "catchall," *Kumar*, 880 F.3d at 154, and courts generally have interpreted it to require "strict compliance," *ibid.*; *Magness*, 247 F.3d at 615; *Transaero*, 30 F.3d at 154. But see *Peterson* v. *Islamic Republic of Iran*, 627 F.3d 1117, 1129 (9th Cir. 2010) (upholding defective service based on substantial compliance with Section 1608(a)(3) where plaintiffs' counsel, rather than the clerk of court, mailed a copy of the default judgment to the minister of foreign affairs). Thus, while service reasonably calculated to provide actual notice might suffice under Section 1608(b), it is plainly insufficient under Section 1608(a), unless it specifically complies

with one of the enumerated methods of service. See, *e.g.*, *Russello*, 464 U.S. at 23.

The standard applied by the court of appeals also is at odds with Section 1608(a)'s hierarchical structure. The court stated that service by "mail addressed to an embassy" would reliably be transmitted to a foreign state's foreign minister because it could be "forwarded to the minister by diplomatic pouch." J.A. 182. As an initial matter, one sovereign cannot dictate the internal procedures of the embassy of another sovereign. Moreover, the court of appeals' reasoning incorrectly assumes that service under Section 1608(a)(3) should be available in most circumstances. In fact, the statute "specifically contemplates that service via [S]ubsection (a)(3) may not be possible in every foreign state." *Kumar*, 880 F.3d at 160. To that end, it provides that if service under that subsection cannot be made within 30 days, a plaintiff may attempt service under Section 1608(a)(4), which provides for the State Department to transmit service "through diplomatic channels to the foreign state." 28 U.S.C. 1608(a)(4). As the Fourth Circuit correctly observed, "[*t*]*hat* is the subsection that Congress intended plaintiffs to use to take advantage of the reliability and security of the diplomatic pouch." *Kumar*, 880 F.3d at 160.[3]

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[3] The court of appeals' standard is also inconsistent with Congress's delineation in Section 1608(a) of four exclusive methods of service. While the court stated that its opinion did "not suggest" that service under Section 1608(a)(3) could be made "via other offices in the United States * * * , such as, *e.g.*, a consular office, the country's mission to the United Nations, or a tourism office," J.A. 214 n.3, the court provided no reason why its reasonable-efforts or actual-notice standard would not be satisfied by mailing documents to those locations (or others) for forwarding to the minister of foreign affairs. Cf. *Kumar*, 880 F.3d at 155 ("[T]he view that subsection (a)(3) only

B. The United States' Treaty Obligations And Diplomatic Interests Further Demonstrate That The FSIA Does Not Permit Service On A Foreign State By Mailing Process To The Foreign State's Embassy In The United States

1. a. Interpreting Section 1608(a)(3) to require that service materials be sent to the ministry of foreign affairs in the country concerned, not the foreign state's embassy in the United States, also ensures compliance with the Vienna Convention on Diplomatic Relations, which the United States signed in 1961 and ratified in 1972. See 23 U.S.T. 3227. The VCDR "codified long-standing principles of customary international law with respect to diplomatic relations." *767 Third Ave. Assocs.* v. *Permanent Mission of The Republic of Zaire to the United Nations*, 988 F.2d 295, 300 (2d Cir.), cert. denied, 510 U.S. 819 (1993). Article 22 of the VCDR sets out certain obligations of the United States with respect to foreign diplomats and diplomatic missions in this country. *Boos* v. *Barry*, 485 U.S. 312, 322 (1988). Article 22(1) provides that "[t]he premises of" a foreign state's "mission shall be inviolable," and "[t]he agents of the receiving State may not enter them, except with the consent of the head of the mission." VCDR art. 22(1), 23 U.S.T. 3237, 500 U.N.T.S. 106; see also *id.* art. 22(2), 23 U.S.T. 3237, 500 U.N.T.S. 108 ("The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity."). Mission inviolability means, among other things, that

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requires a particular recipient, and not a particular location, would allow the clerk of court to send service to *any* geographic location so long as the head of the ministry of foreign affairs of the defendant foreign state is identified as the intended recipient.").

"the receiving State * * * is under a duty to abstain from exercising any sovereign rights, in particular law enforcement rights, in respect of inviolable premises." Eileen Denza, *Diplomatic Law* 110 (4th ed. 2016) (Denza); see *767 Third Ave. Assocs.*, 988 F.2d at 300 (The VCDR "recognize[s] no exceptions to mission inviolability.").

Section 1608(a)(3) should be interpreted in a manner that is consistent with the United States' obligations under the VCDR. See, *e.g.*, *Cook* v. *United States*, 288 U.S. 102, 120 (1933) ("A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."); 1 Restatement (Third) of the Foreign Relations Law of the United States § 114 (1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict * * * with an international agreement of the United States."). Construing Section 1608(a)(3) to require that process be mailed to the ministry of foreign affairs in the foreign state protects the inviolability of foreign embassies within the United States.

b. The Executive Branch has long interpreted Article 22 and the customary international law it codifies to preclude serving a foreign state with process by mail or personal delivery to the state's embassy. In 1964, the State Department took the view that "[t]he establishment by one country of a diplomatic mission in the territory of another does not * * * empower that mission to act as agent of the sending state for the purpose of accepting service of process." *Hellenic Lines, Ltd.* v. *Moore*, 345 F.2d 978, 982 (D.C. Cir. 1965) (Washington, J., concurring) (quoting Letter from Leonard C. Meeker, Acting Legal Adviser, U.S. Dep't of State, to John W. Douglas, Assistant Att'y Gen., U.S.

Dep't of Justice (Aug. 10, 1964)). The United States has consistently adhered to that position, including in the court of appeals in this case. See Gov't C.A. Amicus Br. 5-6; Gov't C.A. Amicus Br. at 10-13, *Kumar*, *supra* (No. 16-2267).

As the Fourth Circuit recognized, that "longstanding policy and interpretation" of Article 22 is "authoritative, reasoned, and entitled to great weight." *Kumar*, 880 F.3d at 158; see *Abbott* v. *Abbott*, 560 U.S. 1, 15 (2010) ("It is well settled that the Executive Branch's interpretation of a treaty 'is entitled to great weight.'") (citation omitted); *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 184-185 (1982); *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961); see generally U.S. Const. Art. II, § 2, Cl. 2, and § 3 (reserving to the Executive Branch the ability to "make Treaties" and "receive Ambassadors and other public Ministers"). The Executive Branch's interpretation is consistent with the prevailing understanding of Article 22. As a leading treatise explains, it is "generally accepted" that "service by post on mission premises is prohibited." Denza 124. Other treatises are in accord. See James Crawford, *Brownlie's Principles of Public International Law* 403 (8th ed. 2012) ("It follows from Article 22 that writs cannot be served, even by post, within the premises of a mission."); Ludwik Dembinski, *The Modern Law of Diplomacy* 193 (1988) (Article 22 "protects the mission from receiving by messenger or by mail any notification from the judicial or other authorities of the receiving State."). And other countries also share this understanding. See, *e.g.*, Pet. Supp. Cert. Br. App. 2a (Note Verbale from the Republic of Austria to the State Department (Apr. 11, 2017)); Kingdom of Saudi Arabia Cert. Amicus Br. 12-14.

Moreover, domestically, the Fourth and Seventh Circuits have recognized that attempting to serve a foreign state or its instrumentality "through an embassy [in the United States] is expressly banned * * * by [the VCDR]." *Autotech Techs. LP*, 499 F.3d at 748; see *Kumar*, 880 F.3d at 156 ("[T]he Vienna Convention's inviolability provision prohibits * * * service delivered to the foreign nation's embassy in the United States.").

The Convention's drafting history also supports the United States' view. See *Water Splash, Inc.* v. *Menon*, 137 S. Ct. 1504, 1511 (2017) (considering treaty drafting history); *Medellin* v. *Texas*, 552 U.S. 491, 507-508 (2008) (same). "[T]he drafters of the Vienna Convention considered and rejected exceptions" to mission inviolability, "opting instead for broad mission inviolability." *767 Third Avenue Assocs.*, 988 F.2d at 298. In a report accompanying a preliminary draft of the VCDR, the United Nations International Law Commission stated that "the receiving State is obliged to prevent its agents from entering the premises for any official act whatsoever." *Report of the International Law Commission Covering the Work of Its Ninth Session, 23 Apr.-28 June 1957*, 12 U.N. GAOR Supp. No. 9, at 6, U.N. Doc. A/3623 (1957), *reprinted in* [1957] 2 Y.B. Int'l L. Comm'n 131, 137, U.N. Doc. A/CN.4/SER.A/1957/Add.1. With respect to service of process specifically, the report explained:

> [N]o writ shall be served within the premises of the mission, nor shall any summons to appear before a court be served in the premises by a process server. Even if process servers do not enter the premises but carry out their duty at the door, such an act would constitute an infringement of the respect due to the mission.

Ibid.

2. This Court has afforded "'great weight'" to the Executive Branch's interpretation of treaties in part because "[t]he Executive is well informed concerning the diplomatic consequences resulting from" judicial interpretations of such agreements. *Abbott*, 560 U.S. at 15 (citation omitted); see also *Verlinden*, 461 U.S. at 493 ("Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States."); *Kumar*, 880 F.3d at 157 ("[T]he Court properly considers the diplomatic interests of the United States when construing the Vienna Convention and the FSIA."). Here, the United States has substantial diplomatic interests in ensuring that foreign states are served properly before they are required to appear in U.S. courts, as well as in preserving the inviolability of diplomatic missions under the VCDR. See *Boos*, 485 U.S. at 323 (recognizing the United States' "vital national interest in complying with international law."). By departing from the prevailing understanding of Article 22, the rule adopted by the court of appeals threatens harm to the United States' foreign relations.[4]

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[4] As discussed above, see pp. 1-2, *supra*, the United States also has substantial interests in ensuring that U.S. victims of state-sponsored terrorism receive appropriate recoveries. In light of those interests, on remand, respondents should be permitted to correct the deficient service by requesting that the clerk of court send "a copy of the summons and complaint and a notice of suit * * * to the head of the ministry of foreign affairs" of the Republic of Sudan in Khartoum, Sudan. 28 U.S.C. 1608(a)(3). Cf. *Kumar*, 880 F.3d at 160 (remanding to the district court "with instructions to allow Kumar to perfect service of process in a manner consistent with this opinion"); *Barot*, 785 F.3d at 29-30 (noting that "there is no statutory deadline for service under the Foreign Sovereign Immunities Act" and instructing the district court to "afford" the plaintiff "the opportunity to effect service pursuant to" Section

The decision below also threatens the United States' treatment as a litigant in courts abroad. "[T]he concept of reciprocity * * * governs much of international law," *Boos*, 485 U.S. at 323; and "some foreign states base their sovereign immunity decisions on reciprocity," *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984). See *National City Bank* v. *Republic of China*, 348 U.S. 356, 362 (1955) (noting that foreign sovereign immunity "deriv[es]" in part from "reciprocal self-interest"). It is therefore appropriate to construe the FSIA in light of the United States' interest in reciprocal treatment in foreign courts. *Persinger*, 729 F.2d at 841 (the United States' interest in reciprocity "throw[s] light on congressional intent"); see also *Boos*, 485 U.S. at 323 (respecting the diplomatic immunity of foreign states "ensures that similar protections will be accorded" to the United States); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963) (construing statute to avoid "invit[ing] retaliatory action from other nations").

The United States' reciprocal interests strongly support interpreting the FSIA not to permit service by mail to a foreign state's embassy in the United States. The United States engages in extensive activities overseas in support of its worldwide diplomatic, security, and law enforcement missions, and it is not infrequently sued in foreign courts. See generally Civil Div., U.S. Dep't of Justice, *Office of Foreign Litigation* [(OFL)] (Aug. 1, 2017), https://www.justice.gov/civil/office-foreign-litigation ("At any given time, foreign lawyers

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1608(a)(3) by requesting that the clerk of court send papers "to the 'head of the ministry of foreign affairs' in Lusaka, Zambia") (citation omitted).

under OFL's direct supervision represent the United States in approximately 1,000 lawsuits pending in the courts of over 100 countries."). The State Department and OFL have informed this Office that the United States routinely refuses to recognize the propriety of service through mail or personal delivery by a private party or foreign court to a United States embassy, even if a mail clerk has signed for the package. Instead, when a foreign litigant or court officer purports to serve a complaint against the United States by delivery to an embassy, the United States' practice is that the embassy sends a diplomatic note to the foreign ministry in the forum state, explaining that the United States does not consider itself to have been served consistent with international law and thus will not appear in the litigation or honor any judgment that may be entered against it. See 2 U.S. Dep't of State, *Foreign Affairs Manual* § 284.3(c) (2013). The United States has a strong interest in ensuring that its courts afford foreign states the same treatment that the United States contends it is entitled to under the VCDR. See *Kumar*, 880 F.3d at 158.

3. The court of appeals acknowledged that in light of the Executive Branch's expertise, potential implications for the United States' foreign relations, and reciprocity concerns, the Executive Branch's treaty interpretation is to be afforded "great weight." J.A. 225 (citation omitted). In reality, however, the court "summarily rejected [the government's] position." *Kumar*, 880 F.3d at 159 n.11 (citation omitted); see J.A. 225.

a. The court of appeals again distinguished between "service on an embassy or consular official," which it agreed "would be improper" under the VCDR, J.A. 222, and "mailing papers to a country's foreign ministry *via*

the embassy," which it decided did not violate the Convention, J.A. 216. In particular, the court stated, "where the suit is not against the embassy or diplomatic agent, but against the foreign state with service on the foreign minister *via* the embassy address, we do not see how principles of mission inviolability and diplomatic immunity are implicated." J.A. 182.

As the Fourth Circuit explained, that is an "artificial, non-textual" distinction. *Kumar*, 880 F.3d at 159 n.11; see *id.* at 157 (distinction arises from "meaningless semantic[s]"). Contrary to the court of appeals' suggestion, see J.A. 182-183, a suit against an embassy *is* a suit against the foreign state. See 28 U.S.C. 1603(a); *El-Hadad* v. *United Arab Emirates*, 216 F.3d 29, 31-32 (D.C. Cir. 2000) (treating suit against foreign embassy as suit against the state); *Gray* v. *Permanent Mission of the People's Republic of the Congo to the United Nations*, 443 F. Supp. 816, 820 (S.D.N.Y.) (holding that permanent mission of foreign country to the United Nations is a "foreign state" under the FSIA), aff'd, 580 F.3d 1044 (2d Cir. 1978). Thus, regardless of whether service is made "on" or "via" an embassy, mailing service to the embassy treats it as the state's "de facto agent for service of process," in violation of the VCDR's principle of mission inviolability. *Kumar*, 880 F.3d at 159 n.11. Indeed, the court of appeals' decisions in this case demonstrate that it treated service on an embassy and service "via" an embassy as functionally equivalent: It considered service to have been completed when a return receipt was purportedly received *from petitioner's embassy*, rather than when the package ultimately made its way "to the head of the ministry of foreign affairs of the country concerned," 28 U.S.C. 1608(a)(3). See J.A.

88, 177 & n.5, 210-211, 216-217; but see J.A. 225-226 (declining to consider Sudan's argument that "the evidence does not support a finding that the mailing was accepted by Sudan or delivered to the Sudanese Minister of Foreign Affairs" because it was made "too late").

b. The court of appeals also suggested that service "via" petitioner's embassy was permissible under the VCDR because the embassy "consent[ed]" to service by "accept[ing]" the papers. J.A. 223. That is incorrect. The VCDR provides that "agents of [a] receiving State may not enter [a mission], *except with the consent of the head of the mission*." VCDR art. 22(1), 23 U.S.T. 3237, 500 U.N.T.S. 106 (emphasis added). "Simple acceptance of the certified mailing from the clerk of court [by an embassy employee] does not demonstrate a waiver [of the VCDR's protections]." *Kumar*, 880 F.3d at 157 n.9; cf. VCDR art. 1(a), 23 U.S.T. 3230, 500 U.N.T.S. 96 (defining "head of the mission"); *id.* art. 1(b)-(h), 23 U.S.T. 3230-3231, 500 U.N.T.S. 96, 98 (defining roles of other employees at a diplomatic mission). And no record evidence suggests that petitioner's ambassador to the United States—the head of the mission—was aware of, much less consented to receive, respondents' service of process. See VCDR art. 22(1), 23 U.S.T. 3237, 500 U.N.T.S. 106.

c. For similar reasons, the court of appeals was incorrect to minimize the United States' foreign-relations and reciprocal-treatment concerns on the ground that "the United States (or any other country)" could "enforc[e] a policy of refusing to accept service via its embassies." J.A. 222-223. The VCDR recognizes that foreign states have a legal right to the inviolability of their missions; the burden is not on those states to affirmatively adopt policies to protect that right. The VCDR addresses this

issue by permitting only the "head of the mission" to make exceptions to the default rule of mission inviolability. Art. 22(1), 23 U.S.T. 3237, 500 U.N.T.S. 106. The FSIA should not be read to adopt a different framework.

C. The FSIA's Legislative History Confirms That Congress Intended The Act To Bar Service By Mail To A Foreign State's Embassy In The United States

1. The FSIA's legislative history underscores that Section 1608(a)(3) cannot be satisfied by mailing service papers to a foreign state's embassy. In particular, the legislative history demonstrates that Congress intended for service under the FSIA not to violate Article 22 of the VCDR, and for such service to be delivered abroad.

a. This Court has recognized that "one of the FSIA's basic objectives, as shown by its history," was to "embod[y] basic principles of international law long followed both in the United States and elsewhere." *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1319 (2017); see also, *e.g.*, *Permanent Mission of India to the United Nations* v. *City of New York*, 551 U.S. 193, 199 (2007) (one of the "well-recognized * * * purposes of the FSIA" is the "codification of international law at the time of the FSIA's enactment"). Consistent with that purpose, the legislative history demonstrates that Congress rejected proposed provisions that would have conflicted with the VCDR. An early draft of the FSIA permitted service on a foreign state by "registered or certified mail * * * to the ambassador or chief of mission of the foreign state" in the United States. S. 566, 93d Cong. 1st Sess. sec. 1(1) [§ 1608] (1973). The State Department and Department of Justice recommended removing that method based on their view that it would violate Article 22 of the

VCDR, and a subsequent version of the bill eliminated that method of service. H.R. 11315, 94th Cong., 1st Sess. sec. 4(a) [§ 1608] (1975); see House Report 6, 26; 122 Cong. Rec. 17,465, 17,469 (1976); *Service of Legal Process by Mail on Foreign Governments in the U.S.*, 71 Dep't St. Bull., No. 1840, at 458 (Sept. 30, 1974); see also, *e.g.*, *Helmerich*, 137 S. Ct. at 1320 (noting the State Department's role in drafting the FSIA); *Samantar* v. *Yousuf*, 560 U.S. 305, 323 n.19 (2010) (same). Congress's decision to remove service by mail to a foreign state's ambassador to the United States strongly supports the conclusion that Congress did not intend for the FSIA to permit service "via" or in "care of" an embassy, which is functionally equivalent. See pp. 26-28, *supra*; *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.") (citation omitted).

The House Report accompanying the bill that became the FSIA further supports the view that service under Section 1608(a)(3) must be sent to the ministry of foreign affairs in the country concerned. The House Report explains that some litigants had attempted to serve foreign states by "mailing * * * a copy of the summons and complaint to a diplomatic mission of the foreign state." House Report 26. The Report describes that practice as being of "questionable validity" and states that "Section 1608 precludes this method so as to avoid questions of inconsistency with section 1 of article 22 of the [VCDR]." *Ibid.* Thus, "[s]ervice on an embassy by mail would be precluded under th[e] bill." *Ibid.*

b. The House Report also confirms that Congress intended for service under Section 1608(a)(3) to occur

abroad. The House Report states that the "procedure" set forth in Section 1608(a)(3) "is based on rule 4(i)(1)(D), F.R. Civ. P." House Report 24. At the time of the FSIA's enactment, Rule 4(i) was entitled "Alternative Provisions for Service *in a Foreign Country*," and Subsection (1)(D) provided for service upon a party in a foreign country "by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served." Fed. R. Civ. P. 4(i) (1976) (emphasis added; capitalization altered). Statements at congressional hearings on the FSIA likewise reflect the understanding that service on a foreign state under Section 1608(a)(3) would occur abroad. Witnesses described Section 1608(a)(3) as providing for service by "mail to the foreign minister *at the foreign state's seat of government*," and as not being complete "unless a signed receipt is received *from abroad*" within a specified period. *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 75, 96 (1976) (emphases added) (testimony of Michael Marks Cohen, Chairman of the Committee on Maritime Legislation of the Maritime Law Association of the United States, and statement of the Committee on International Law of the Association of the Bar of the City of New York).

2. The court of appeals disregarded the legislative history because the House Report "fail[ed] to" recognize what the court viewed as a distinction "between '[s]ervice on an embassy by mail,' and service on a minister [of] foreign affairs via or care of an embassy." J.A. 218 (citation and emphases omitted). But as discussed

above, see pp. 26-28, *supra*, that distinction is merely "semantic[]." *Kumar*, 880 F.3d at 157.

In any event, the court of appeals misread the legislative history. The House Report explicitly disapproved of "attempting to commence litigation against a foreign state" by "mailing * * * a copy of the summons and complaint *to* a diplomatic mission of the foreign state." House Report 26 (emphasis added); see *ibid.* ("Section 1608 precludes th[at] method."). And it makes clear that Congress instead intended for service on a foreign state to occur abroad. See pp. 30-31, *supra*. Congress thus sought to prevent parties from effecting service by mailing process papers to a foreign state's embassy within the United States, regardless of whether the papers are directed to the ambassador—which the court of appeals agreed would violate the FSIA and the VCDR, see J.A. 222—or to the foreign minister, as occurred here.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded for further proceedings.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 1602 provides:

Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

2. 28 U.S.C. 1603 provides:

Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

3. 28 U.S.C. 1604 provides:

Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

4. 28 U.S.C. 1608 provides:

Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall

send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

5. Fed. R. Civ. P. 4 provides in pertinent part:

Summons

* * * * *

(j) Serving a Foreign, State, or Local Government.

(1) *Foreign State.* A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608.

(2) *State or Local Government.* A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by:

(A) delivering a copy of the summons and of the complaint to its chief executive officer; or

(B) serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.

* * * * *

(m) Time Limit for Service. If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1), or to service of a notice under Rule 71.1(d)(3)(A).

* * * * *

No. 16-1094

In the Supreme Court of the United States

REPUBLIC OF SUDAN,

Petitioner,

v.

RICK HARRISON, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF FORMER U.S. COUNTERTERRORISM OFFICIALS, NATIONAL SECURITY OFFICIALS, AND NATIONAL SECURITY SCHOLARS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici are national security scholars and former federal officials who held senior positions in areas concerned with counterterrorism, diplomacy, and national security. Amici have spent their careers developing, interpreting, and enforcing this country's framework of federal laws designed to prevent heinous acts of terrorism. Amici's experience confirms that successfully starving terrorist organizations of funding is a sure way to save American lives. Amici also understand that private lawsuits must be an integral component of any strategy to keep money out of terrorists' hands.

Amici have previously participated in cases where the potency of private civil lawsuits as weapons for fighting terrorism was threatened. *Kiobel* v. *Royal Dutch Petrol. Co.*, No. 10-1491 (arguing that the Alien Tort Statute, 28 U.S.C. § 1350, allows claims against corporations for violations of international law); *Jesner* v. *Arab Bank PLC*, No. 16-499 (same); *Bank Markazi* v. *Peterson*, No. 14-770 (advocating successfully for the constitutionality of the Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502, 126 Stat. 1258, which allows for execution on funds held by Iran's central bank to satisfy certain terrorism-related judgments against Iran, 22 U.S.C. § 1882); *Rubin* v. *Islamic Republic of Iran*, No. 16-534 (arguing that enactment of Section 1610(g) of the Foreign Sovereign Immunities Act made

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[1] Petitioner and respondents have lodged blanket consent letters with the court. No counsel for any party authored this brief in whole or in part, and no entity other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

all property of state sponsors of terror available for attachment, not merely property "used for a commercial activity in the United States," *id.* § 1610(a)).

This case concerns another effort to undermine the potency of civil lawsuits as terror-fighting tools by eliminating one of the few available options to effectuate service of process on most state sponsors of terror. That result would further increase the already-astronomical cost, risk, and time required for these suits, and would hand terror-sponsoring nations another strategy to evade justice for their support of heinous acts of hate.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Section 1608(a)(3) of the Foreign Sovereign Immunities Act provides a vital strategic tool for victims of state-sponsored terrorism. This is because, as this case shows, the simple act of effectuating service of process on a foreign sovereign accused of material support of terrorism can stretch out for years—even decades. The strained relations that usually exist between the U.S. and these rogue regimes tends to limit the available avenues for service. Service options are then limited further through these nations' procedural tactics, which turns service alone into a never-ceasing war of attrition against terror victims.

Section 1608(a)(3)'s provision for service by mail supplies a vital counterweight to those tactics, because it provides terror victims with options. That provision dictates *the person* to whom the summons and complaint must be directed: the foreign minister of the recipient state. And it requires that the packet containing those items be transmitted to the foreign minister with appro-

priate "dispatch[]." *Ibid.* But, as Respondents have persuasively demonstrated, Section 1608(a)(3) provides options for getting it there. The service packet might be mailed to the foreign minister directly in the recipient state. Or it might be mailed to that country's embassy here in the U.S., to be provided to the minister. These options allow clerks and victims to determine for themselves the method that will best provide the putative defendant with notice while minimizing the likelihood of strategic evasions from the rogue state. Indeed, this case is a success story in Congress's effort. Service by mail has been effectuated several times—and Sudan has been aware of the underlying lawsuits for years.

Yet Sudan tries to take one of those precious options under 1608(a)(3) off the table, using the hammer-blow of international law. Sudan claims that simply transmitting a letter to another state's foreign minister through its embassy is impermissible, a violation of the principle of mission inviolability embodied in Article 22 of the Vienna Convention on Diplomatic Relations. But the Vienna Convention simply cannot be read as Sudan insists, even with the Government bolstering its position.

The principle of mission inviolability embodied in Vienna Convention Article 22 is a time-honored protection that nations afford to other nations' diplomatic envoys. It protects the physical premises of the embassy as foreign soil, preventing agents of the host state from asserting sovereign rights on the mission's premises. And it imposes a duty on host nations to treat the diplomatic mission with the respect the dignity of its task deserves, and its unique diplomatic function requires, to ensure that respectful discourse between nations can be maintained.

The overwhelming consensus of the nations who drafted and ratified the Vienna Convention, and the considered opinion of signatory nations today, holds that this inviolability principle is not offended by service by mail. Indeed, this consensus holds that service can be made directly on the embassy or the ambassador, by mail sent to the embassy grounds—a circumstance where inviolability concerns are at their zenith. And that consensus controls the Convention's meaning.

That makes this an easy case, because this case does not involve service on an embassy, or even on an ambassador. It involves service *through* an embassy, to a non-embassy official. Even if some lingering inviolability concerns might exist when a summons appears on an ambassador's desk, those concerns are completely absent when a front-desk clerk receives a service packet by mail addressed to the foreign minister, signs for it, and arranges for it to be transported to the home office. That sequence of events might have some importance from a procedural perspective for calculating deadlines. It might even comprise a necessary step for obtaining personal jurisdiction over the foreign sovereign. But the force of U.S. law felt in that sequence lands in the home country, and has not been brought to bear on the embassy premises, or the front-desk clerk—after all, she can refuse to sign for the packet without U.S.-legal consequences being visited upon her. And the embassy's diplomatic functions remain unaffected. No one calls the ambassador in to consult on sending a package, so the ambassador is not distracted from her diplomatic duties. And sending a package to the home office is something that front-desk clerks do all the time. Article 22's inviolability principle is thus in no way implicated in this case, and neither the

Government nor Petitioner cite a single source establishing otherwise.

The Government insists that its contrary reading of the Convention, and its decision to align with a state sponsor of terror, should be given deference based on high-minded rhetoric about protecting other nations in our courts. But the Government's true concerns are more self-interested, and they are reflexive, not rational. The Government ultimately admits that its current treaty interpretation is advanced primarily to support the policy it adheres to when being served in other nations' courts—a stance that provides far narrower and more particular options when others sue us than what we require other nations to accept in our courts. The Government contends that a ruling for Sudan is necessary to ensure reciprocal respect for that policy, and worries that a win for Respondents might provoke a spate of retaliatory legislation from other nations. But Sudan's position is no better for reciprocity than Respondents', because neither cures the asymmetry in the Government's stance. And the mere act of serving a foreign minister through an embassy is unlikely to cause international tensions to flare, because foreign sovereigns enjoy many procedural protections in our courts that serve to cool potential tensions. The Government's illusory foreign-relations concerns thus provide no reason to give uncritical deference to the Government's convenient treaty interpretation, any more than it is a reason to defer to its overly restrictive interpretation of the FSIA. It is certainly no reason to hand state sponsors of terror another procedural roadblock they can use to evade service, thereby undermining an important weapon in the war on terror.

ARGUMENT

I. Serving other countries' foreign ministers by mail sent to their U.S. embassies is consistent with this country's treaty obligations.

Sudan and the Government lean heavily on the Vienna Convention of Consular Relations, *done* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, to support their interpretation of FSIA Section 1608(a)(3), claiming that their position is necessary to remain faithful to the concept of mission inviolability embodied in Article 22 of the Convention. Respondents have detailed numerous reasons why interpreting the Vienna Convention is not necessary to understand Section 1608(a)(3)'s meaning—the primary one being that the statutory text unambiguously supports Respondents' interpretation. But in any event, the Vienna Convention serves as no obstacle to the service option that Respondents have chosen here—service by mail on the foreign sovereign's foreign ministry through its U.S. embassy.

A. Service by mail on an embassy, or even on an ambassador, does not offend Article 22's principle of mission inviolability.

Both Sudan and the Government claim that service by mail "on," "through," "in care of," or "via" a foreign state's U.S. embassy violates Article 22 of the Vienna Convention. Pet. Br. 31; U.S. Br. 26-27. But that is simply incorrect. In reality, neither Article 22 nor the principles of mission inviolability it embodies are offended when service of process is mailed to an embassy—regardless of the preposition involved.

Article 22 provides protection for a foreign nation's diplomatic mission in the United States from physical intrusions. It protects "[t]he premises of" the mission as foreign soil, requiring that they "shall be inviolable"—meaning that the "[t]he agents of the receiving State may not enter them, except with the consent of the head of the mission." Vienna Convention art. 22(1), 23 U.S.T. 3237, 500 U.N.T.S. 106. That requires the receiving nation to "abstain from exercising any sovereign rights, in particular law enforcement rights, in respect of inviolable premises." Eileen Denza, *Diplomatic Law* 110 (4th ed. 2016). It also requires that receiving nations take "all appropriate steps * * * to prevent any disturbance of the peace of the mission or impairment of its dignity." *Id.* art. 22(2), 23 U.S.T. 3237, 500 U.N.T.S. 106.

Some suggest that the principle of mission inviolability goes beyond these protections for consular mission *premises*, to protect mission *personnel*, requiring that they enjoy "full and unrestricted independence in the performance of their allotted duties," Pet. Br. 36 (citation omitted), and that there be no interference "upon the unique characteristics of [the] diplomatic mission." *Kumar* v. *Republic of Sudan*, 880 F.3d 144, 157 (4th Cir. 2018). It is unlikely, however, that mission inviolability extends so far—especially because mission personnel and their diplomatic business enjoy special immunities provided elsewhere in the Convention.[2]

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[2] Articles 26 and 29, for instance, protect the inviolability of diplomats and embassy officials, while Articles 24 and 27 protect the inviolability of diplomatic files and correspondence.

In any event, nothing in Article 22 or its inviolability principle is violated through service by mail sent to the embassy. It is the act of an agent of the receiving State exercising sovereign power on consular property that Article 22 prohibits. That principle would thus prohibit in-person service of process within an embassy even when conducted by a private process server. This is because in-person service involves a person entering the premises for the purpose of asserting U.S. legal power—as one step necessary to assert jurisdiction of a U.S. court over the foreign sovereign. 28 U.S.C. § 1330(b).

Yet service by mail *to* embassy premises cannot be conflated with in-person service *on* embassy premises, despite what Sudan suggests. Pet. Br. 44. Mailing a letter requires no U.S. government agent—or anyone operating under color of U.S. law—to cross the embassy's threshold. Such agents might place the packet in the mail, but the packet is actually delivered to the embassy by a mailman who is no more an "agent" exercising power of the receiving state than the "milkman." Resp. Br. 37 (quoting 7 Marjorie M. Whiteman, *Digest of International Law* § 36, at 376 (1970)).

Service by mail on the embassy also does not interfere with an embassy's uniquely diplomatic functions. Even if the embassy or the ambassador herself is the addressee for a summons meant for the sovereign, there has been no exercise of U.S. legal power on embassy premises. "No personal service [is] made on diplomats and no attempt would be made to subject them personally to the jurisdiction of a United States court." Andreas F. Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U. L. Rev. 901, 934 (1969). The assertion of jurisdiction is on the

foreign state, not the ambassador, so no U.S. legal force is brought to bear on the embassy premises.

Certainly that situation involves no *more* an assertion of legal power or diplomatic interference than when service "through diplomatic channels to the foreign state" is attempted under 28 U.S.C. § 1608(a)(4), under which the summons is delivered directly to the foreign state's embassy, 22 C.F.R. 93.1(c)(2). That option involves the same use of the embassy's mail as the method Respondents chose, and doubles the compulsion by bringing two branches of government to bear on the embassy premises. The involvement of diplomatic officials also raises the stakes of a simple lawsuit to a potential international conflict. If Congress believed that the Section 1608(a)(4) process was consistent with its treaty obligations, then it must have understood that the practically identical but legally less significant process under Section 1608(a)(3) was too. Accordingly, both the text of Article 22 and the inviolability principles it embodies would permit service by mail on the U.S. consulate of a foreign nation.

The Government and Sudan insist otherwise, claiming support for their position from the Convention's drafting history and interpretations by other signatory nations, commentators, and Executive Branch officials. But at each turn, their position is misleading and incomplete. A more accurate account shows each of these authorities to be on Respondents' side.

1. The Convention's drafting history.

All agree that the Vienna Convention's "drafting history" is relevant in interpreting its provisions. U.S. Br. 23 (quoting *Water Splash, Inc.* v. *Menon*, 137 S. Ct. 1504, 1511 (2017) (considering treaty drafting history); *Medel-*

lin v. *Texas*, 552 U.S. 491, 507-508 (2008) (same)); Pet. Br. 38; Resp. Br. 38. But a complete and accurate account of the Convention's history shows that it supports Respondents, not Sudan or the Government.

The subject of serving process on embassy officials in a manner compatible with mission inviolability was much discussed by the commission that drafted Article 22—The United Nations' International Law Commission (ILC). The ILC's sessions repeatedly confirmed the same consensus: There was "almost unanimous agreement" that "serving of writs at the premises of diplomatic missions" was "an act contrary to international law." *Summary Records of the Ninth Session of the International Law Commission*, [1957] 1 Y.B. Int'l L. Comm'n 1, 64, U.N. Doc. A/CN.4/SER.A/1957. (*ILC Ninth Session Summary Records*). Yet it was just as "clearly understood that the serving of notices through the post *would not* infringe the inviolability of a mission's premises." *Summary Records of the Tenth Session of the International Law Commission*, [1958] 1 Y.B. Int'l L. Comm'n 1, 131, U.N. Doc. A/CN.4/SER.A/1958 (emphasis added) (*ILC Tenth Session Summary Records*).

The Commission committed this understanding to writing in a 1957 draft report on the Vienna Convention submitted the United Nations General Assembly—the same report from which Sudan and the Government try to glean a contrary understanding. U.S. Br. 23 (citing *Report of the International Law Commission Covering the Work of Its Ninth Session*, 23 April-28 June 1957, 12 U.N. GAOR Supp. No. 9, at 6, U.N. Doc. A/3623 (1957), reprinted in [1957] 2 Y.B. Int'l L. Comm'n 131, 137, U.N. Doc. A/CN.4/SER.A/1957/Add.1 (ILC *Ninth Session Report*)); see also Pet. Br. 38-39 (same). But that report's

sole purpose was to clarify "that certain types of writ"—those that required personal service to be effective—"could not be served *on mission premises*." *Tenth Session Summary Records* 131 (statement of Mr. Fitzmaurice, United Kingdom representative) (emphasis added). The 1957 draft report thus explained that only physical intrusions onto consular premises were prohibited, providing that "no writ shall be served within the premises of the mission, nor shall any summons to appear before a court be serviced in the premises by a process server." *ILC Ninth Session Report* 137. This prohibition extended to bar "process servers" that "carry out their duty at the door." *Ibid.* But care was taken in the 1957 report to *avoid* any implication that the article was meant to "prevent the serving of a process through the post, which was not" the report's aim. *ILC Ninth Session Summary Records* 65. Despite these efforts, however, the 1957 ILC draft report left some room for confusion by including a statement that all writs constituting service of process "must be delivered through the Ministry for Foreign Affairs of the receiving State." *ILC Ninth Session Report* 137. This seemed to suggest that the only internationally acceptable method of service would be service by diplomatic means through the foreign ministry of "the receiving State"—*i.e.*, the state hosting the diplomatic mission to be served.

Yet any confusion on this score did not last long. The Japanese delegation led an effort to have the draft report clarified to ensure that the "possibility of sending writs through the post should not be excluded." *ILC Tenth Session Summary Records* 131. The issue was significant to the Japanese, because for them service by diplomatic agents was the norm: "[I]n cases where civil actions were

brought against diplomatic agents, the procedure was to notify diplomatic agents through the post." *Ibid.* Japan claimed it would experience "some difficulty if no allowance were made for that proceeding." *Ibid.* Other representatives expressed support for Japan's effort. E.g., *id.* at 139 (statement of Iranian representative); *ibid.* (statement of Swedish representative); *ibid.* (statement of Fitzmaurice).

Thus when the ILC produced its final report in 1958, it modified the draft report's language to clarify that "there is nothing [in proposed Article 22] to prevent service through the post if it can be effected in that way." *Report of the International Law Commission Covering the Work of Its Tenth Session*, 28 April-4 July 1958, 13 U.N. GAOR Supp. No. 9, at 17, U.N. Doc. A/3859 (1958), reprinted in [1958] 2 Y.B. Int'l L. Comm'n 78, 95, U.N. Doc. A/CN.4/SER.A/1958/Add.1 (*ILC Tenth Session Report*) (emphasis added). The revised version also deleted the troublesome language suggesting that certain judicial writs "must be delivered through the Ministry for Foreign Affairs Of the receiving [s]tate." *Compare ILC Ninth Session Report* 137 with *ILC Tenth Session Report* 95. Instead, the final report explained that in some countries persons seeking to effectuate service "may"—but are not required to—apply to the Ministry for Foreign Affairs of the receiving State" if they wished assistance in effectuating service. *ILC Tenth Session Report* 95.

Despite these changes in the 1958 final report, the Japanese representative remained concerned. Japan feared that burying the ILC's position on service by mail in an explanatory comment would not be clear enough, thinking that "it cannot be considered as self-evident

from the original text of the article." *ILC Tenth Session Summary Records* 137. The Japanese minister thus proposed adding a new paragraph to the text of Article 22 itself prohibiting writs "served by a process server within the premises of the mission." U.N. Conference on Diplomatic Intercourse and Immunities, *Annexes, Final Act, Vienna Convention on Diplomatic Relations, Optional Protocols, Resolutions*, U.N. Doc. A/CONF20/14/Add.1, at 22 (Vol. II) (1962). This was meant to "to incorporate" the final report's language regarding service, "[p]articularly, the concept of the fifth sentence" clarifying that service by mail was allowed. *Ibid.*

The Japanese minister later withdrew this proposal for amending Article 22, satisfied that "discussion within the Committee [of the Whole] had established a unanimous consensus that service could be effected by mail." Ernest L. Kerley, *Some Aspects of the Vienna Conference on Diplomatic Intercourse and immunities*, 56 Am. J. Int'l L. 88, 102 (1962).

Although this formal amendment was withdrawn, the 1958 final report was still submitted along with the draft articles of the Convention to the U.N. General Assembly *ILC Tenth Session Report* 79. The report thus served as the basis for the Convention's adoption by the General Assembly and its ratification by all 185 of the current signatories. Denza 124.

The Government and Sudan ignore virtually all of this extensive drafting history supporting the view that service by mail to consular premises is permissible. Instead, their collective efforts focus on a single piece of evidence: the 1957 ILC draft report. U.S. Br. 23; Pet. Br. 38-39. But both Sudan and the Government fail to show how this draft report, which deliberately preserved the option of

service by mail, could be compatible with the view that this service method was prohibited. And neither the Government nor Sudan mention the essential fact that the 1957 draft they rely upon was changed in the 1958 final report, to make clear that service by mail was *allowed*. That disingenuous treatment of the Convention's drafting history does not make for a compelling argument.[3]

Sudan, but not the Government, strays even further afield in attempting to cobble together a supposed "unanimous" consensus in favor of its interpretation from two isolated snippets of the ILC hearing records. Pet. Br. 39. But it is easy to see why even the Government will not join Sudan on this ledge.

Sudan focuses first on a statement attributed to the Japanese representative upon his decision to withdraw the proposal to amend the text of Article 22 to clarify that service by mail was allowed. The Convention record suggests he did so believing "'it was the unanimous interpretation of the [Committee of the Whole] that no writ could be served, even by post, within the premises of a

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[3] Sudan fares no better in emphasizing that portion of the 1957 draft report providing that *"[a]ll judicial notices * * * must be delivered through the Ministry for Foreign Affairs of the receiving State"* Pet. Br. 39 (quoting *ILC Ninth Session Report* 6), as if to suggest that the defendant nation's foreign ministry is the only permissible destination for service of process. For one thing, the "Ministry for Foreign Affairs of the receiving State" does not refer to the ministry of the *defendant* state, but rather that of *host* state—on these facts, the ministry of the *United States*, not that of Sudan. For another, the draft was modified to remove the implication that all process must be sent to any single destination, which was thought to be "unnecessarily categorical." *ILC Tenth Session Summary Records* 131.

diplomatic mission.'" Pet. Br. 37 (quoting United Nations Conference on Diplomatic Intercourse and Immunities, *Summary Records of Plenary Meetings and Meetings of the Committee of the Whole* 141, U.N. Doc. A.CONF.20/14 (Vol. I) (1962) (*U.N. Conference Summary Records*). But this statement sure seems odd. Odd indeed for the Japanese representative to abandon an amendment that his country had championed as critical to preserve its practices for serving diplomats. Odder still for him to do so based on a "consensus"—appearing nowhere in the convention record—that seems to flout the *actual* consensus of the ILC, and the apparent consensus of the Committee of the Whole. Resp. Br. 42 (citing *U.N. Conference Summary Records* 137-140 (statements of Soviet, Norwegian, Spanish, Ghanaian, and Turkish representatives indicating support of service by post on diplomatic premises)). And the kicker: If the Japanese representative (or the rest of the ILC, or the Committee of the Whole) really had a sudden change of heart against service by mail, why would any of them be satisfied with merely withdrawing the proposed amendment to Article 22? Would it not also be incumbent upon them to call for amendment to the 1958 report that expressly permitted service by mail? Sudan answers none of these crucial questions.

It thus seems more likely that the statement attributed to the Japanese representative was a mistranslation or mis-transcription. What the Japanese representative probably *meant* to convey was that he was withdrawing his proposal because "discussion within the Committee had established a unanimous consensus that service *could be* effected by mail." Kerley 102 (emphasis added). That, in fact, is how the statement was apparently under-

stood by at least one former U.S. State Department attorney who would have been likely to know what really transpired. *Ibid.*

Sudan's reliance on a statement of the Argentine representative Pet. Br. 39, is similarly misplaced. The Argentine representative noted that he "approved the idea behind the Japanese amendment," but announced that he would vote against it 'if it were to be interpreted as permitting the service of a writ through the post.'" Pet. Br. 39 (quoting *U.N. Conference Summary Records* 137). Sudan reads this as an objection to any measure that would allow host states to provide for service by mail on embassy premises. But it makes no sense that the Argentine representative would object to a proposal to amend the text of Article 22 based on something that *was already allowed* under the 1958 final report, or that he would do so based on a proposal he had approved of. More likely, he simply wished to register concern that the proposal might be interpreted to foist the obligation to provide service by mail on states against their will, rather than to simply give them the option whether to allow for it. In any event, there is no question that the Argentinian representative was alone even in taking this idiosyncratic view.

In short, these isolated snippets cannot undermine the entire thrust of the Vienna Convention debates, and the unambiguous understanding upon which the Convention was enacted and ratified, which provides that service by mail on embassies is permitted under the Vienna Convention.

2. *The considered consensus of law-abiding states.*

Sudan and the Government also claim to have a consensus of sister states to support their position. See Pet. Br. 46-47; U.S. Br. 22. But it is surprising the lengths that they must go to find supporters. Most of the states on their list were once sponsors of terror themselves, who face potential civil liability for their past terrorist support—even if they are now claim to be reformed. See, e.g., Christopher M. Blanchard, Cong. Research Serv., RL 33142, *Libya: Background and U.S. Relations* 6 (2008) (noting that the State Department designated Libya a state sponsor of terrorism until 2006); *Hurst* v. *Socialist People's Libyan Arab Jamahiriya*, 474 F. Supp. 2d 19, 26 (D.D.C. 2007) (holding Libya liable for the 1988 bombing of Pan Am Flight 103); *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 78 (2d Cir. 2008) (noting Saudi Arabia's support for terrorism); Glenn R. Simpson, *U.A.E. Banks Had Suspect Transfers*, Wall St. J., Sep. 17, 2003, at A10 (discussing U.A.E.'s financing of terrorism). Even seemingly innocent Austria faces potential liability for its past Holocaust-related acts. See, e.g., *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004).

At least one of these countries has actively lobbied against efforts to allow civil suits for victims of terrorism. See CBS News, *Saudis paid U.S. veterans to lobby against law allowing 9/11 families to sue kingdom*, May 17, 2017) (discussing U.A.E. efforts to lobby against the Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, 130 Stat. 852), <https://cbsn.ws/2D6g6ox>. All of these countries' opinions ought to be considered of a piece with that effort—yet another attempt to lobby for service loopholes they might someday exploit to escape

justice. In no event should their self-serving positions be trusted as authoritative interpretations of Article 22.

This is especially true when the body of opinion from other, law-abiding countries goes the other way. The true, considered consensus of sister states on the permissibility of service by mail has remained unchanged since the drafting and ratification of the Vienna Convention; in fact, it has only cemented over time. Just last year, the Supreme Court of the United Kingdom held that the Vienna Convention permitted service of process by mail on a diplomatic residence, *Reyes* v. *Al Malki*, [2017] UKDC 61, which, under Article 30 of the Vienna Convention, "enjoy[s] the same inviolability and protection as the premises of the consular mission." Such "decisions of the court of other Convention signatories," *El Al Israel Airlines Ltd.* v. *Tsui Yuan Tseng*, 525 U.S. 155, 175 (1999), are entitled to "considerable weight." *Air France* v. *Saks*, 470 U.S. 392, 404 (1985) (citation omitted).

The Director of the Norwegian Foreign ministry has announced a similar position that "[c]onveying a writ through the postal services has not in itself * * * been considered an infringement of the inviolability of the premises of the mission." Rolf Einar Fife & Kristian Jervell, *Elements of Nordic Practice 2000: Norway*, 70 Nordic J. Int'l L. 531, 553 (2001). "[W]e must, absent extraordinarily strong contrary evidence, defer to" these interpretations of sister states. *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 185 (1982).

3. The Government's "longstanding" interpretation.

The Government's fares no better in its bid to obtain deference for its supposed "longstanding policy and in-

terpretation" of Article 22 and "the customary international law it codifies." U.S. Br. 21-22. At best, the deference due to the Government's interpretation of a treaty is never "conclusive," *Sumitomo*, 457 U.S. at 184, and only matters to the extent it illuminates the treaty's true meaning. See *BG Grp., PLC* v. *Republic of Argentina*, 572 U.S. 25, 37-38 (2014). The Government's interpretation does not do that. And its position is anything but "longstanding."

As a participant in the ILC, the U.S. was certainly aware of, and put up no resistance to, the consensus view that Article 22 would permit service by mail. And the U.S. ratified the Convention based on that understanding. After ratification, "the United States had consistently favored permitting service by post" for more than a decade. Denza 124. Thus, in 1973, during the drafting of the FSIA, the Secretary of State maintained that "it was generally accepted during the drafting of the Vienna Convention on Diplomatic Relations that the prohibition [on service within the embassy] does not apply to service effected by mail." *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 43 (1973) (*House Report*). And the State Department used this consensus view to support its proposal in the "early draft of the FSIA," U.S. Br. 29, that would allow for service by mail on a foreign state via its U.S. embassy. *House Report* 43.

The Government's interpretation of the Vienna Convention only changed after the Japanese minister's misattributed remarks during the Vienna Convention's

drafting somehow "[came] to [its] attention."[4] See Department of State, *Service of Legal Process by Mail on Foreign Governments in the United States*, 71 Dep't St. Bull., No. 1840, at 459 (Sept. 30, 1974) (citing *U.N. Conference Summary Records* 141).

Only then did the Government change its policy on acceptance of service at U.S. embassies abroad. And only then did the State Department recommend revising the draft of FSIA to disallow service by mail on the embassy. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 26 (1976). It is thus the Government's earlier, correct, interpretation of Article 22, not its newly revised and incorrect one, that controls. "The meaning of [a] treaty cannot be controlled by subsequent explanations" of its meaning, even by "some of those who may have voted to ratify it." *The Diamond Rings*, 183 U.S. 176, 180 (1901).

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[4] The Government claims its opinion has an older vintage, dating to a 1964 letter the Department of State submitted in *Hellenic Lines, Ltd.* v. *Moore*, 345 F.2d 978, 982 (D.C. Cir. 1965). U.S. Br. 21-22 (citing Letter from Leonard C. Meeker, Acting Legal Adviser, U.S. Dep't of State, to John W. Douglas, Assistant Att'y Gen., U.S. Dep't of Justice (Aug. 10, 1964)) (Meeker Letter). But the Meeker Letter says nothing about Article 22, except it bars service "in the premises of an embassy." *Id.* at 9. And while it concludes that embassies cannot act "as agent of the sending state for the purpose of accepting process," this conclusion results from principles of agency law—that a country's establishment of a diplomatic mission "did not implicitly or explicitly empower that mission to act as agent"—not principles of treaty interpretation. *Ibid.*

4. The scholarly consensus.

Sudan and the Government also claim support for their treaty interpretation from a series of modern scholars, claiming that they represent the "prevailing understanding of Article 22." U.S. Br. 21. But the prevailing understanding among scholars writing around the Convention's ratification was different, and included many State officials that were familiar with the drafting effort. To them, "[n]othing in the Vienna Convention or in customary international law prevents the use of the mail to notify a foreign state that it is required to answer a summons and complaint." Lowenfeld 934; William L. Griffin, *Adjective Law and Practice in Suits Against Foreign Governments*, 36 Temp. L.Q. 1, 13 (1962); see also Note, *Jurisdictional Immunities of Foreign States*, 23 DePaul L. Rev. 1225, 1240 (1974); Richard Crawford Pugh & Joseph McLaughlin, *Jurisdictional Immunities of Foreign States*, 41 N.Y.U. L. Rev. 25, 31-32 (1966).

The scholars cited by the Government and Sudan cannot upset this settled understanding. U.S. Br. 21; Pet. Br. 37-38. Their leading treatise, U.S. Br. 21, Denza's *Diplomatic Law*, actually recognizes that the "original understanding" of Article 22 was "that service by post would not in itself be a breach of inviolability." Denza 124, 126. Yet it wrongly assumes this original understanding was discarded in "practice," based largely on the U.S. change in interpretation of Article 22. *Id.* at 124. Thus the U.S. demonstrates "consistency" with scholars only by bootstrapping on *its own* shifting position. U.S. Br. 22.

Further, their side's leading scholar admits that rigid prohibition of service by mail on embassy premises is bad policy, "[g]iven that many individuals resident in such premises may not be entitled to immunity from jurisdic-

tion." *Id.* at 126. And she cites cases, such as *Reyes*, that buck the modern "practice," marking a return to the original understanding of Article 22. *Ibid.*

The other scholars cited by Sudan and the Government are worse. One bases his opinion on an irrelevant case about in-person service, *Hellenic Lines*, 345 F.2d at 979, augmented only by the U.S.'s changing position and Denza's infirm one. James Crawford, *Brownlie's Principles of Public International Law* 29 (8th ed. 2012). Another offers little more than his bare read of the Vienna Convention, which to him makes it "perfectly clear" that Article 22 does the exact opposite of what the people who drafted, accepted, and ratified the Convention understood it to do. Ludwik Dembinski, *The Modern Law of Diplomacy* 193 (1988). And he is reading the wrong part of Article 22 (subsection 3) to boot. *Ibid.* These scholars' views offer little to commend them.

Whatever the confusion percolating through a few self-interested rogue states, academic thinkers, or even the U.S., nothing can undermine the clear, coherent consensus of the ILC, the Committee of the Whole, the General Assembly and the 180 *other* states that ratified the Convention. It likewise cannot control over the understanding possessed by the United States before its deviation in "practice." These are all perfectly consistent, and all agree that even service by mail on an ambassador herself—the head of the consular mission—would be perfectly acceptable, even to the mission—the seat of her office—where inviolability concerns would be at their highest.

B. Service by mail routed *through* the embassy presents even less inviolability concern.

That makes this an easy case, because here inviolability is at its lowest ebb. Whatever theoretical inviolability concerns might exist from service on an ambassador or embassy, they are virtually absent when a service packet is mailed to the foreign minister—who enjoys no inviolability protection—and the service packet is simply routed through the embassy.

When a service packet for the foreign sovereign is addressed to the embassy itself, the summons arrives on the desk of the ambassador as head of the mission. Once there, the ambassador must make decisions about what to do with the summons—decisions could affect the legal rights of the sovereign. It could therefore be said that the ambassador experiences some compulsion of U.S. law, however indirect.

By contrast, when service is delivered by mail *through* the embassy, such compulsion is completely absent. The front-desk clerk is asked only to read the label, sign for the service package, and passes it on for delivery. None of those requests is backed by a compulsion to act under force of U.S. law. She is free to refuse to sign for the package without any U.S. legal repercussions. As Respondent explains (at 28), those events might cause service to fail, but none would subject the clerk to liability under U.S. law. She is completely free from the "official and coercive nature of a summons." Pet. Br. 44.

Service by mail routed through the embassy also involves no interference with diplomats' "unrestricted independence in the performance of their allotted duties" Pet. Br. 36, and causes no diversion of embassy resources

from the uniquely diplomatic functions of the mission. It is unlikely that the ambassador or any diplomatic officials will ever *see* the summons, much less be required to make decisions about it. The task is handled entirely by the front desk and the mailroom, and involves functions that mailrooms and front desks do all the time. Thus, the mission might become a de facto *messenger* for the summons, but not a de facto *agent*. U.S. Br. 27, Pet. Br. 42.

Service by mail likewise does not involve conscription of the "diplomatic pouch" in any manner that would be prohibited by the Vienna Convention, despite what Petitioner fears. Pet. Br. 46. Nothing requires that the summons be transmitted in the diplomatic pouch. Embassy personnel may thus transmit the summons to the foreign minister using the same secure email and fax services that virtually all businesses now use. Resp. Br. 28 (citing Anthony Aust, *Handbook of International Law* 122 (2d ed. 2010)).

Perhaps most importantly, while Vienna Convention Article 27 protects the inviolability of the diplomatic pouch, that only prevents the pouch from being *opened* by the receiving State. It cannot be said that principle prohibits anyone from even requesting that the embassy pass on a letter. And compliance with that request is completely voluntarily—if the embassy objects to participating in the transmittal of a service packet, or deems the task too onerous, it can simply refuse. For these reasons, even the most aggressive of scholars have never suggested that service by mail merely routed through an embassy would be inconsistent with U.S. treaty obligations.

II. Service by mail routed through a foreign state's U.S. embassy is unlikely to adversely affect U.S. foreign relations.

Interpretive issues aside, the Government claims that its opinion on the Vienna Convention should control as it is the branch possessing the institutional sensitivity to properly assess the "'diplomatic consequences resulting from' judicial interpretations" of treaty obligations. U.S. Br. 24 (quoting *Abbott* v. *Abbott*, 560 U.S. 1, 15 (2010)). But that sensitivity may sometimes prove to be an *over*-sensitivity, as in this case.

The Government claims an interest in ensuring that other countries are served "in a manner consistent with the United States' treaty obligations." U.S. Br. 10. That interest is certainly legitimate, but does not demand preference for the Government's interpretation, because adoption of Respondents' interpretation is equally faithful to those treaty obligations.

The Government gets closer to the heart of the matter when it insists that adoption of its treaty interpretation is necessary to ensure reciprocal respect for its own position on service in foreign courts. But it is difficult to understand how a ruling for Petitioner better respects reciprocity than a ruling for Respondents. After all, *neither* of the options offered to the Court for resolving this case mirrors the U.S.'s aggressive and asymmetrical stance on service abroad. When sued abroad, the Government refuses to accept service by mail on its embassy premises *or* at its foreign ministry—the U.S. Department of State. Instead, it asserts that "service on the U.S. government is only proper when transmitted" through "diplomatic channels" or "Article 5 of the Hague

Service Convention" by delivery to the U.S.'s designated "Central Authority"—the Department of Justice's Office of International Judicial Assistance. Department of Justice, *Service of Process on the United States Government* (Nov. 4, 2016) (*State Service Guidance*) <tinyurl.com/usgservice>. The Petitioner's stance that service must go directly to the foreign minister does no more to the realign this asymmetry than Respondents' position does. Accordingly, concerns of reciprocity have no bearing on this case.

The Government also fails to show how Respondents' position is uniquely dangerous to its service policy. The likelihood that this case will provoke a spate of retaliatory actions from other states is slim—but not because of the protections of international law do anything to prevent it. Indeed, the Vienna Convention's principles already permit states to decide whether to allow service by mail on U.S. embassies abroad, and has since the Convention was approved and ratified. Hence, international law has never offered the U.S. policy *any* protection from retaliation.

What actually prevents retaliation are the multiple layers of protections in U.S. law that make it unlikely that issues surrounding service on foreign sovereigns will produce the kind of outrage that might lead to a raft of retaliatory laws threatening U.S. policy.

These start with the Government's own notice policy. As the Government notes, *State Service Notice* 2, it does not hide behind procedural roadblocks in a strategic attempt to evade justice as Sudan has done. Rather, it gives notice to the serving party's foreign minister when service problems arise, thus ensuring that service can be

properly effectuated. *Ibid.* That simple step will usually keep tensions over service at bay.

There are also mechanisms that prevent issues of service of process upon foreign stations in our courts from escalating into the kinds of conflicts that would produce retaliatory action. The FSIA's procedural rules offer protection to foreign nations in our courts that make issues of service unlikely to cause offense. These include a generous period for the foreign nation to respond to a summons, allowing 60 days in most cases, 28 U.S.C. § 1608(d), so even if there is some delay in transmitting a summons overseas, the delay is unlikely to result in a default. The FSIA also requires a notice of a potential default to be served on the foreign state before the default becomes final. *Id.* § 1608(e). And as Respondent notes, the default can be set aside if the original process is not opened by the foreign minister in time to respond. Resp. Br. 26 (citing, e.g., *Hilt Constr. & Mgmt. Corp.* v. *Permanent Mission of Chad to the United Nations*, Civ. No. 16-6421, 2017 WL 4480760, at *2-*3 (S.D.N.Y. Oct. 6, 2017)). These protections make the risk of default less likely, and serve to diffuse tensions when problems do arise. Perhaps the surest sign that this is true is that there has not been a retaliation *already*. Current U.S. policy hardly "minimize[s]" "foreign-relations and reciprocal-treatment concerns." U.S. Br. at 28. It maximizes them. But if the *current* asymmetry of the U.S. policy is not enough to provoke retaliation, it is hard to see how recognizing the acceptability of service via embassy will prompt any adverse reaction.

Finally, the Government correctly notes that international law is a matter of mutually assured "reciprocity," U.S. Br. 25 (citation omitted), and it thus largely what we

make of it. That ought to make the Government concerned with the signals it sends to other nations, and the legal loopholes it introduces into its domestic laws, with its hypermetrical and over-protective reading of international law. The Government would do better to put aside these concerns, and adhere to the paths of service that Congress provided in FSIA and the obligations regarding service in the treaties it has joined. In short, the Government should be offering more than "sympathy" for victims and "condemn[ation]" of state terror sponsors. U.S. Br. 1. It should be advancing a legal interpretation that protects victims and allows them recourse.

III. Service via mail transmitted through a foreign embassy is a vital option in civil suits against state sponsors of terror.

Interpreting the Vienna Convention to provide terror victims the option of serving a foreign state's foreign minister by mail routed through the country's embassy is important to remain consistent with the text of the Convention and the principles of inviolability it embodies. But it is also important to preserve the means of service most likely to actually reach the foreign minister in many cases, and to preserve civil judgments as an effective terror fighting tool.

A. The most effective way to give notice to a foreign sovereign is often through its embassy.

The efforts of the Government and Sudan to remove the option of mailing service packets through an embassy builds on the assumption that this form of service is less likely to actually make it to the foreign minister herself than a service packet mailed directly to the foreign ministry. U.S. Br. 19; Pet. Br. 45.

That premise is unfounded. In fact, there are a variety of reasons why a service packet routed through the embassy is *more* likely to arrive intact than a service packet mailed directly to the foreign ministry. For one thing, "the reliability of postal service may vary from country to country." Fed. R. Civ. P. 4, *Adv. Comm. Notes to the 1963 Amendments*. So in many countries, simply addressing the packet to the foreign ministry is no guaranty that it will actually get there. For another, it may be hard, especially in many transitional governments, to know who the "foreign minister" is, or whether the "foreign ministry" is located at any given time. And these problems are heightened when it comes to the highly unstable, often infrastructurally weak nations that tend to resort to terror sponsorship.

Service through an embassy minimizes these problems. Foreign missions have direct lines of communications with the home country, and a pipeline to route communications to the proper offices and officials. It is thus no more likely that a letter will be lost in transit between the foreign ministry and the home base, as it would be lost between the foreign-ministry's mailroom and the foreign minister's office. Accordingly the Second Circuit had good reason to believe that the option of service via the embassy "could reasonably be expected to result in delivery to the intended person" and that the embassy was a "logical" location for service. J.A. 214 & n.3.

B. Maintaining the option of service via embassy is essential to protect civil suits as effective terror-fighting tools.

Removing the option of service via the embassy will also make terror suits much harder for plaintiffs. For the particular plaintiffs in this case, they will be forced to start over and try service again, further delaying any recovery after decades of fighting. More generally, shrinking the options-box under Section 1608(a)(3) will also play into the hands of rogue terror states in other lawsuits, giving them opportunities to plague victims with procedural headaches. That will make terror suits even more expensive, risky, and drawn out, which will jeopardize civil suits as key weapons in the war on terrorism.

1. Prohibiting service here would sap the vitality of civil litigation as a key weapon in the war on terror.

Amici have written elsewhere of the vital role that civil litigation plays in supplementing governmental anti-terrorism efforts. Br. of Fmr. U.S. Counterterrorism and National Security Officials as Amici Curiae in Support of Petitioners at 20-28, *Jesner* v. *Arab Bank, PLC*, No. 16-449. This is because terror enterprises "rest[] on a foundation of money." See *Antiterrorism Act of 1990: Hearing on S. 2465 Before the Sen. Subcomm. on Courts & Admin. Practice*, 101st Cong. 84 (1990) (testimony of Joseph A. Morris, former General Counsel, U.S. Information Agency). When funds available to terrorists are constrained, their capabilities decline. Less money is available to maintain the high costs of terror networks and carry out operations. And terrorists are forced to route funds through ever more complicated, and less se-

cure, means, increasing the likelihood that their violent plans will be uncovered.

Government efforts to combat terror financing have had some success. The 9/11 Commission Report, *Final Report of the National Commission on Terrorist Attacks Upon the United States* 382–383 (2004), <http://bit.ly/1jwpzQZ>. For instance, documents found in Osama Bin Laden's compound revealed that the global efforts to restrict terrorist funding frustrated al Qaeda's efforts to raise and transfer money around the world. Juan C. Zarate, *Treasury's War: The Unleashing of a New Era of Financial Warfare* ix (2013).

Yet government enforcement alone is not enough to stanch the flow of terror funds. Limited government resources mean that many terror transactions simply lie beyond the government's reach, despite the more than $1 trillion spent since 9/11 to combat terror. Amy Belasco, Cong. Research Serv., RL 33110, *The Cost of Iraq, Afghanistan, and Other Global War on Terror Operations Since 9/11* 5 (2014), <http://bit.ly/1IRYWqi>.

Civil litigation provides an essential complement to government enforcement efforts, augmenting the government's capabilities without adding to the taxpayer-borne bottom line. Civil claimants multiply the resources available to uncover terror-funding networks, and they possess monetary incentives that ensure that they will find and pursue leads that might otherwise go unnoticed. Civil litigation also provides advantages over criminal investigation and enforcement or multinational enforcement efforts, including a lower burden of proof, an absence of constitutional restrictions on investigation, and more liberal discovery rules than government or multinational investigating agencies enjoy. Jimmy Gurulé, *Un-*

funding Terror: the Legal Response to the Financing of Global Terrorism 325 (2008) (*Unfunding Terror*). It will thus come as no surprise that it was ultimately private plaintiffs, not federal law enforcement, that brought the Ku Klux Klan to its knees, through a string of wins in civil litigation. See Jack D. Smith & Gregory J. Cooper, *Disrupting Terrorist Financing With Civil Litigation*, 41 Case W. Res. J. Int'l L. 65, 77 (2009).

2. Civil suits targeting foreign sovereigns are especially effective in deterring terror financing.

Suits against designated terror-supporting sovereigns can be especially effective in choking off funding to terror networks. The states that actively support terrorism are few in number—there are currently only four: Iran, North Korea, Sudan, and Syria. U.S. Dep't of State, *Country Reports on Terrorism 2017* 217-220 (*2017 Country Report*), <https://bit.ly/2xlMkHa>. But they represent some of the biggest funding sources of terror activities.

Civil litigation against such terror-supporting nations provides a major opportunity to halt terror funding. These nations provide a large percentage of many terror groups' operating budgets, so persuading even one of them to cease funding terror would deal a major blow to worldwide terror finance. Indeed, "while the prospect of large monetary judgments may have little or no deterrent value for radical jihadists, the same may not be true of individual donors, charitable organizations," or, for that matter, foreign sovereigns. *Unfunding Terror* 324. And changing the behavior of these terror-sponsoring states will likely prove easier than halting terrorists' other sources of funding, such as drug trafficking, counter-

feiting, ransom, bribes, and other illegal trade. Eben Kaplan, Council on Foreign Relations, *Tracking Down Terrorist Financing* (Apr. 4, 2006) <on.cfr.org/2i3KgOE>; Itai Zehorai, *The World's Richest Terrorist Organizations*, Forbes Int'l, Dec. 12, 2014, <bit.ly/2vC8WCA>.

Since their sponsorship of terror is often as much military strategy as political or religious ideology, *e.g.*, U.S. Dep't of Def., *Unclassified Annual Report on Military Power of Iran* 1-3 (2010), <http://bit.ly/2vJQsOu>, that strategic course could change if the costs of the strategy could be made to outweigh the benefits. This is especially true when many of these countries have substantial assets in the United States that might be attached to enforce civil terrorism judgments, such as the estimated $1.7 billion that Iran has here. *Hr'g before the H. Subcomm. on the Constitution and Civil Justice on H.R. 2040*, 114th Cong., 2d Sess. 63 (July 14, 2016) (Testimony of Professor Jimmy Gurulé). Accordingly, there is some chance that these nations' strategic behavior will be shaped by the prospect of massive terror-related judgments. Faced with potential awards that often range in the hundreds of millions—or even billions—of dollars, *e.g.*, *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1317 (2016) (concerning multiple judgments against Iran "together amounting to billions of dollars"), these nations might eventually be persuaded that it is better to stop funding terror, and join the body of legitimate nations, than to continue funneling money to support terror activities only to face massive liabilities on top of those costs. Moreover, for these countries, the condemnation of a civil judgment itself will provide a meaningful disincentive. Indeed, experts estimate that civil judgments have had a

noticeable impact upon the present regime in Iran, even if they have not convinced them to change. *Peterson* v. *Islamic Republic of Iran*, 264 F. Supp. 2d 46, 62 (D.D.C. 2003).

But civil judgments cannot have any meaningful impact unless service can be effectuated. Terror-sponsoring countries will be little dissuaded by threats of monetary awards, no matter their size, when they can evade any award for decades through procedural shenanigans. By the same token, plaintiffs will not bring suit if there is no prospect for recovery. This provides yet another reason why FSIA section 1608(a)(3) and the Vienna Convention should be interpreted to allow service by mail on the foreign minister to be routed through U.S. embassies.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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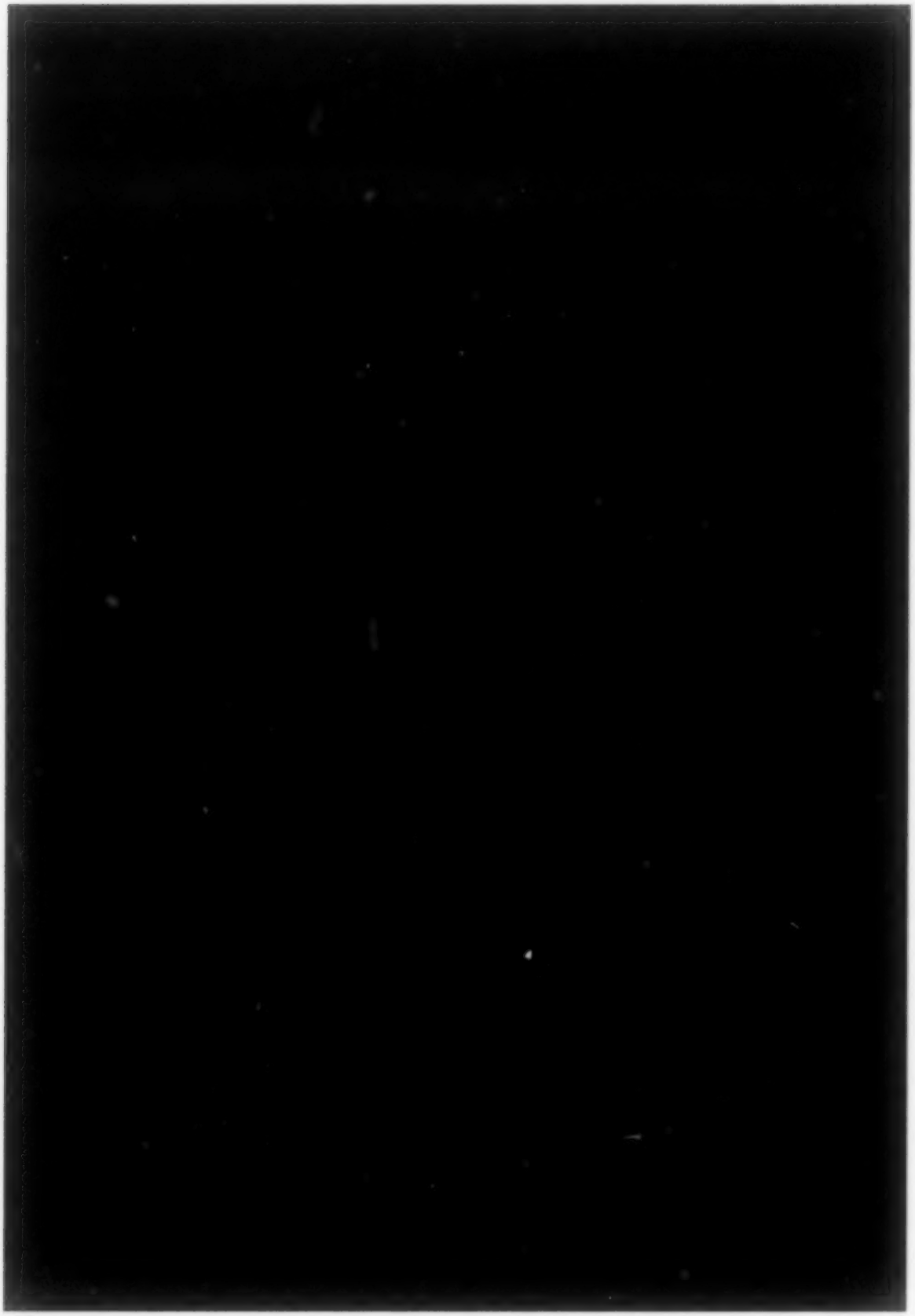

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APPENDIX

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Professor Banks has served as a Special Counsel to the US Senate Judiciary Committee (for the confirmation hearings of Supreme Court nominee Stephen G. Breyer); on the ABA Standing Committee on Law and National Security; as a member of the InfraGard National Members Alliance Board of Advisors; on the Advisory Council for the Perpetual Peace Project; on the Executive Board of the International Counter-Terrorism Academic Community (ICTAC); as an Editorial Board member at The International Centre for Counter-Terrorism in The Hague, The Netherlands; and as a Distinguished Fellow of the Institute for Veterans and Military Families at Syracuse University. Banks also is the Editor-in-Chief of the Journal of National Security Law & Policy.

Kevin Cieply – Kevin Cieply is President and Dean of the Ave Maria School of Law and an expert on national security law. Before his academic career, Dean Cieply served as Chief, Legal Operations (Land), North American Aerospace Defense Command (NORAD) and U.S. Northern Command (NORTHCOM), concentrating

on counterterrorism and Defense Support of Civilian Authorities. He also served for more than 22 years in the Army and Wyoming Army National Guard as a helicopter pilot and judge advocate. In civilian life, he also worked as Special Assistant U.S. Attorney and Senior Legal Advisor on all military matters for the Wyoming Army National Guard.

Jimmy Gurulé – Professor Gurulé is a tenured member of the law faculty at Notre Dame Law School, where he teaches courses in criminal law, international criminal law, the law of terrorism, and national security Law. Professor Gurulé served as Under Secretary (Enforcement) at the U.S. Department of the Treasury, from 2001-2003. In this capacity, he played a central role in developing and implementing the U.S. Government's counterterrorist financing strategy. He also served as Assistant Attorney General from 1990-1992 during the administration of President George H.W. Bush. He has published numerous books and articles on counterterrorism law and legal strategies for combating the financing of global terrorism.

Malvina Halberstam – Professor Halberstam is a member of the founding faculty of the Benjamin N. Cardozo School of Law. She has served as an assistant district attorney, as a reporter for the American Law Institute (Model Penal Code Project), and as a counselor on international law for the US Department of State, Office of the Legal Advisor. As counselor, she supervised the State Department's comments on what became the Restatement of U.S. Foreign Relations Law (Third) and headed the U.S. delegation in the negotiations on the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, adopted in Rome in

1988.

Dennis M. Lormel – Mr. Lormel is an international expert addressing terrorist financing, money laundering, fraud, and financial crimes. He amassed extensive major case experience in the FBI while working there from 1976 through 2003, as a street agent, supervisor and senior executive, particularly in complex finance related crimes. In response to the terrorist attacks of September 11, 2001, Mr. Lormel assumed responsibility for establishing, coordinating and directing the FBI's comprehensive terrorist financing initiative, serving as Chief of the Terrorist Financing Operations Section, in the Counterterrorism Division. Mr. Lormel is a member of the Advisory Board of the Association of Certified Anti-Money Laundering Specialists.

Rachel E. VanLandingham – Professor Rachel E. VanLandingham, Lt Col (ret.), is a national security law expert and former judge advocate in the U.S. Air Force. She currently teaches criminal law, constitutional criminal procedure, and national security law. During Professor VanLandingham's military career, she served as a military prosecutor, criminal defense attorney, appellate defense attorney and nuclear surety inspector, stationed in the United States, South Korea, and Italy with deployments to the Middle East. She was the legal advisor for international law at Headquarters, U.S. Central Command, where she advised on operational and international legal issues related to the armed conflicts in Afghanistan and Iraq. She also served as the Command's Chief Liaison to the International Committee of the Red Cross, and traveled throughout those countries in efforts to improve procedural safeguards and humane treatment standards for detainees in U.S. custody, as well as

provided advice to the Department of Justice regarding habeas cases brought on behalf of detainees in Afghanistan. She was the Deputy Department Head of the Department of Law and Assistant Professor of Law at the U.S. Air Force Academy in Colorado Springs, Colorado, where she managed a legal department of 19 professors and taught international law and military law courses.

No. 16-1094

IN THE

Supreme Court of the United States

REPUBLIC OF SUDAN,

Petitioner,

v.

RICK HARRISON, *et al.*,

Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* GOVERNMENT OF NATIONAL ACCORD, STATE OF LIBYA IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE

The *amicus curiae* is the newly-established government of Libya, which joins in support of the petitioner to present the perspective of, and unique challenges faced by, fledgling and transitional nations with respect to international service of process.[1] Libya has a substantial interest in ensuring that it is served properly before it is required to appear in a foreign court, as well as in defending the inviolability of its diplomatic mission under the Vienna Convention on Diplomatic Relations ("VCDR").

SUMMARY OF ARGUMENT

Diplomatic inviolability guaranteed by treaty under the VCDR prohibits intrusion onto diplomatic premises—even by mailings—for the purpose of serving process. The Foreign Sovereign Immunities Act ("FSIA") provides the sole and exclusive means of obtaining personal jurisdiction over a foreign sovereign and must be read in harmony with the United States' existing treaty obligations. Accordingly, FSIA Section 1608(a)(3) should be interpreted as barring service by mail on a sovereign government via or "in care of" its foreign embassy.

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[1] Counsel for all parties have consented to the filing of this brief and their notices of consent have been filed with the Clerk. No counsel for a party in this case authored this brief in whole or in part. No person or entity—other than the *amicus*, its members, or its counsel—made a monetary contribution to fund the preparation or submission of this brief.

ARGUMENT

Libya takes no position with respect to the underlying facts in the matter before the Court. Libya strongly condemns all forms, and acts, of terrorism. Although Libya's former pre-revolution regime was the subject of terror-related litigation in the United States, Libya resolved these claims fully in 2008 pursuant to a bilateral settlement agreement with the United States. Libya is now governed by a democratically elected government that works cooperatively with the United States and other nations to combat terrorism. Indeed, Libyan forces have recently worked closely with the United States military to combat ISIL and other violent extremist organizations.

Since the revolution in 2011, Libya has undergone a challenging transition to democracy. Throughout this tumultuous period, Libya has maintained a diplomatic presence in the United States via its embassy in Washington, D.C. During that time, Libya has been subject to a handful of commercial legal disputes in the United States. As a result, Libya has experienced first-hand the difficulties that can arise from attempts to serve process on a nation that is experiencing political strife. In a striking parallel to the issues presented by this case, in 2015, a litigant in a commercial dispute attempted to serve the Libyan government with a complaint via the Libyan embassy in Washington, D.C. *See United Healthcare Ins. Co. v. Libyan Student Plan, et al.*, Case No. 1:15-cv-00760 (D.D.C. dismissed May 26, 2016). The circumstances involved in that dispute—

in which, for a time, two competing factions both claimed to be the legitimate government of Libya—are illustrative of the potential service of process difficulties that can arise in developing or revolutionary states.

In the midst of ongoing civil strife and threats to the new Libyan government, the plaintiff attempted to effect service on Libya by mailing the service documents to the Libyan embassy in the Watergate building in Washington, D.C., rather than addressing them directly to the head of Libya's foreign ministry in Tripoli, as required under FSIA. 28 U.S.C. § 1608(a)(3). Ultimately, Libya was served with the complaint via diplomatic channels pursuant to FSIA Section 1608(a)(4) after service under the preceding section failed. However, the improper attempt to serve Libya via its embassy under Section 1608(a)(3) distracted diplomatic personnel from their official duties and also caused uncertainty about the date on which Libya had been effectively served.

That is exactly the kind of uncertainty that the direct service requirements of FSIA Section 1608(a)(3) were designed to prevent and which transitional states like Libya can least afford. Not all states enjoy the level of political stability and continuity of nations like the United States or the E.U. member nations, in which litigants reasonably can expect normal diplomatic and political functions to continue regardless of world events. Yet, it is these transitional states that have the most at stake in terms of international service of process. For such nations, the connection between their embassies and their home government can be, at times, uncertain.

Moreover, transitional states—often laboring under severe financial constraints—have the most to lose from the entry of a default judgment brought about by improper "forwarding" of service materials directed to one of their foreign embassies. Simply put, developing and transitional nations cannot afford the substantial risks of leaving service of process—and, by extension, the specter of default judgment—in the hands of often-transitory embassy staff who lack any delegated authority over legal matters from their home government. And, pursuant to the diplomatic inviolability guaranteed by treaty under Article 22 of the VCDR, they should not have to.

The Second Circuit's apparent assumption that embassy personnel may be relied on to transmit service materials to the appropriate authority in their home state is flawed. In states affected by unrest, it is all too common for normal channels of communication and routine government functioning to break down. In such circumstances, it is unrealistic to expect embassy or consulate personnel—who themselves may be involved in or preoccupied with disruptions in their home state or in fact are third-country nationals—to always be able to transmit service materials to authorities in the home state in a timely fashion.

Indeed, such transmission may be impossible or impractical where, for example, diplomatic pouch service between the foreign embassy and home nation are disrupted or where embassy personnel are uncertain as to whom the current government recognizes as the acting foreign minister. For such

nations in flux, the best guaranty that service of process will be made to the current and actual representative of the recognized government is strict compliance with the protections embodied in Section 1608(a)(3). While no process is ever perfect or can ensure that service reaches the appropriate recipient, direct service to the ministry of foreign affairs *in the foreign state* provides the best chance that service will reach the recognized authority of the recipient nation. And failing that, the appropriate next course is service under Section 1608(a)(4) via State Department channels.

Accordingly, Libya joins with the petitioner in urging this Court to adopt the view that (1) FSIA Section 1608(a)(3) does not permit service on a sovereign government via or "in care of" its foreign embassy; and (2) in any event, service upon a foreign embassy with the presumption that service documents will be "forwarded" to the home government constitutes an impermissible intrusion onto diplomatic premises in violation of the VCDR.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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BRIEF OF *AMICI CURIAE* INTERNATIONAL LAW PROFESSORS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether plaintiffs suing a foreign state under the Foreign Sovereign Immunities Act may serve process upon the head of the ministry of foreign affairs under 28 U.S.C. § 1608(a)(3) by a mailing "through," "via," or "care of" the foreign state's diplomatic mission in Washington, D.C.

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1

INTEREST OF AMICI CURIAE[1]

Amici curiae listed in the Appendix are law professors and scholars at U.S. law schools who teach, research, and write about international law, both public and private. They share a common view that United States courts must properly apply international treaties to which the United States is a party, thereby adhering to its international legal obligations.

INTRODUCTION

This case involves a $314 million default judgment rendered against a foreign sovereign based upon two crucial conclusions of law: (1) that a foreign embassy is a proper conduit for service of process under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1608(a)(3); and (2) that acceptance of a mail parcel by an embassy's mail room constitutes "consent of the head of the mission" to receive service of process under the Vienna Convention on Diplomatic Relations ("VCDR"), 23 U.S.T. 3227, TIAS 7502 (1972). Each of these conclusions of law is erroneous and jeopardizes long-held principles of international law, practice, and diplomacy critical to the foreign policy of the United States. *Amici curiae* submit this brief to elaborate on the reasons why an embassy is not a proper

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have provided the Clerk letters granting blanket consented to the filing of *amicus* briefs pursuant to Supreme Court Rule 37.2.

conduit for service of process on a foreign sovereign and why a mail room's acceptance of a parcel cannot constitute consent to service by other means.

The FSIA provides that service on a foreign state under 28 U.S.C. § 1608(a)(3) must be made by "any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." The statute thus identifies a specific recipient, and the question is whether the recipient—the "head of the ministry of foreign affairs"—should be served where he or she is actually located—"the ministry of foreign affairs"—or may be served at a location where that official is rarely if ever present—namely, the foreign sovereign's diplomatic mission in the United States.

Amici agree with Petitioner that the plain reading of the statute is that service must occur at the ministry of foreign affairs. It is well accepted that the provisions of § 1608(a) require "strict compliance." *See, e.g.*, *Kumar v. Republic of Sudan*, 880 F.3d 144, 154 (4th Cir. 2018) (observing that "based on §1608(a)'s four precise methods for service of process and how that language contrasts with §1608(b), subsection (a) requires strict compliance"). Yet there is nothing "strict" about allowing service to be sent *via* or *through* agents (such as foreign diplomatic personnel) when that is not specifically allowed by the statute. Even if, *arguendo*, the statute was ambiguous, delivery of service to, via, or through a foreign sovereign's diplomatic mission is both contrary to international law and practice, and the commitments assumed by the United States in the VCDR.

Specifically, service of process on a foreign embassy runs afoul of article 22(1) of the VCDR, which provides that:

> [t]he premises of [a diplomatic] mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

This inviolability of diplomatic missions is a fundamental and longstanding principle of international law, and indisputably includes a prohibition on serving process on an embassy. These principles have been codified in the VCDR as well as the Vienna Convention on Consular Relations, 21 U.S.T. 77, TIAS 6820 (1969), and are routinely followed in actual practice by all states, including the United States. Moreover, customary international law specifically requires that service be made on the ministry of foreign affairs of the served state, and not upon an embassy of that state.

The Second Circuit attempted to circumvent the VCDR's prohibition of service of process on an embassy by means of semantics: arguing that serving the "head of the ministry of foreign affairs" at the embassy was not service *on* an embassy but instead service *via* an embassy.[2] Adoption of this reasoning would elevate form over substance, as the VCDR could be circumvented simply by adding a "To:" line. It would also represent a serious erosion of mission inviolability. It could impair the

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[2] In *Kumar v. Republic of Sudan*, the Fourth Circuit specifically found the Second Circuit's "artificial, non-textual distinction" to be based on "weak and unconvincing" reasoning. *See* 880 F.3d at 159 & n.11.

performance of diplomatic functions and impinge upon the dignity of foreign embassies in the United States, contrary to the text, practice, and purpose of the VCDR. The United States does not recognize such service on American embassies abroad, JA203, but would be significantly impeded in objecting to such service if this Court were to adopt the Second Circuit's reasoning.

There is, moreover, a longstanding rule of statutory construction that this Court should avoid any construction of a statute that would conflict with treaties and international law. *See, e.g.*, *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 81 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."). In addition, in adopting the FSIA, Congress clearly intended it to comply with principles of international law and practice regarding the inviolability of a foreign state's diplomatic mission. *See* H.R. Rep. No. 94–1487, at 2 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6605. Accordingly, there is but one proper construction of 28 U.S.C. § 1608(a)(3): service of process must be sent to the "head of the ministry of foreign affairs" at the ministry of foreign affairs, and may not be served *on*, *via*, or *through* a foreign embassy.

As a further independent ground to reverse, the Second Circuit's decision was based upon a finding that acceptance of the service package by the embassy mailroom "surely constituted 'consent'" under the VCDR. JA223. But the VCDR does not just require "consent" of a mailroom employee, but the "consent of the head of the mission" in order to overcome the mission's inviolability under the

VCDR. The "head of the mission," however, is a defined term in the VCDR, denoting the foreign sovereign's Ambassador or *chargé d'affaires* (an individual who heads an embassy in the absence of the ambassador). VCDR, art. 1(a), 14. Because there is no evidence in this case that the "head of the mission" was ever made aware of the service package, much less consented to the embassy's receipt of service, the premises of the mission remained inviolable, and no delivery of service could properly be made on it. The Second Circuit's decision to the contrary, which infers "consent" from a mail room employee's "acceptance of the service package," is an unprecedented and dangerous expansion of consent under the VCDR.

In order to ensure compliance with obligations under the VCDR and longstanding, widely accepted principles of international law and practice, this Court should reverse the decision of the Second Circuit and hold that service under 28 U.S.C. § 1608(a)(3) must be made on the ministry of foreign affairs. In the alternative, this Court should nonetheless reverse the decision of the Second Circuit and find that no effective service was made here in the absence of any evidence that there was "consent of the head of the mission" to serve process on the embassy, as required by the VCDR.

ARGUMENT

I. THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS DISALLOWS SERVICE OF PROCESS ON A STATE VIA ITS EMBASSY.

The VCDR, adopted in 1961 and ratified by the United States in 1972,[3] represents an essential instrument for the conduct of foreign relations. Among other things, it codified what had long been an established tenet of customary international law, namely the principle of diplomatic immunity from civil and criminal proceedings.[4] Virtually every country on earth is a party to the VCDR,[5] and respect for the principle of diplomatic immunity and the inviolability of diplomatic premises is a firmly established practice of international diplomacy. Indeed, as discussed below, foreign courts uniformly reject attempts to serve process on, via, or through diplomatic missions.

The VCDR states that it is intended to "contribute to the development of friendly relations among nations," and that the privileges and immunities that it provides help to "ensure the efficient performance of the functions of diplomatic missions as representing states." VCDR, preamble. Article 3 of the VCDR identifies five essential functions provided by diplomatic missions:

> (a) Representing the sending State in the receiving State;

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[3] 23 UST 3227, TIAS 7502 (1972).

[4] Anderson, Matthew Smith, *The Rise of Modern Diplomacy 1450-1919*, at 53-54 (Longman, 1993).

[5] 191 states are party to the VCDR. *See* United Nations Treaty Collection, *Vienna Convention on Diplomatic Relations* https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&clang=_en (last visited August 22, 2018).

> (b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
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> (c) Negotiating with the Government of the receiving State;
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> (d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State; and
>
> (e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

The VCDR recognizes that respect for the privileges and immunities of diplomatic missions is essential in order for the sending state to properly perform these diplomatic functions. VCDR, preamble. For example, diplomatic agents enjoy complete immunity from the criminal jurisdiction of the host state, and immunity from all civil and administrative jurisdiction, except in narrow circumstances in which they are acting outside of their official capacity. *See* VCDR, art. 31(1).

Of particular relevance to the present case is the VCDR's guarantee that "[t]he premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission." VCDR, art.

22(1). As the U.S. State Department explains, no entry can be made without permission and consent, "even to put out a fire."[6] This principle would be seriously undermined if anything less than explicit consent were effective to avoid the diplomatic mission's inviolability.

Moreover, the VCDR places a "special duty" on the host state to "take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity." VCDR, art. 22(2).

U.S. courts are cognizant that service of process upon a diplomat or diplomatic mission "might impair the performance of diplomatic functions or otherwise impinge upon a diplomat's dignity." *See Tachiona v. United States*, 386 F.3d 205, 223-224 (2d Cir. 2004) (rejecting service on diplomatic personnel). For example, in the *Hellenic Lines* case, which arose before the FSIA was enacted, the D.C. Circuit rejected service on an ambassador on behalf of "his sending state." *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 980 (D.C. Cir. 1965). The D.C. Circuit found that such service "would prejudice the United States foreign relations and would probably impair the performance of diplomatic functions," and therefore concluded that "the purposes of diplomatic immunity forbid service in this case." *Id.* at 980-81.

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[6] *See* U.S. State Department, *What is a U.S. Embassy?*, https://diplomacy.state.gov/discoverdiplomacy/diplomacy101/places/170537.htm (last visited August 22, 2018).

In *Hellenic Lines*, the court agreed with the Department of State that diplomatic personnel would be "hampered in the performance of [their] duties if . . . [they] were diverted from the performance of [their] foreign relations functions by the need to devote time and attention to ascertaining the legal consequences, if any, of service of process having been made, and to taking such action as might be required in the circumstances." *Id.* at 980 n.5. Further, "[t]he sending state might well protest to the Department that the United States had failed to protect the person and dignity of its official representative" and that "[o]ther governments might interpret the incident as meaning that the Government of the United States had decided, as a matter of policy, to depart from what they had considered a universally accepted rule of international law and practice." *Id.*[7]

By considering service of process to be effective merely by mailing it to an embassy, the Second Circuit's decision results in an uninformed and non-consensual waiver of the mission's inviolability. Further, foreign diplomatic personnel will be required to divert time and attention from their diplomatic duties to determine what they should do with a letter mailed to an individual who is not located at the embassy.[8] Indeed, there may be

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[7] While the *Hellenic Lines* case entailed service by a United States Marshal, a concurring judge observed that "although service of process on an ambassador by registered mail might avoid some of the problems inherent in personal service by a marshal, it would raise others." *Id.* at 982-83 (Washington, J., concurring) (quotation omitted).

[8] And in this case, to an individual who was no longer even employed with the Ministry of Foreign Affairs. Pet. Br. at 7 (noting that the

nothing indicating to the mailroom clerk that such a letter should receive special treatment or requires an immediate response from the embassy. The mailroom personnel may reject the mailing prior to signing for it, but would need to do so without knowing its contents. By contrast, delivery of service to a foreign state's ministry of foreign affairs directed to the head of that ministry delivers the service letter to the seat of the foreign government where it may be given the appropriate attention that it deserves, without any confusion or delay in transmission.

Pursuant to the Second Circuit's decision, however, once the embassy has acknowledged receipt of the mailing, foreign diplomatic personnel are then "expected"—and indeed, required upon pain of default by the foreign sovereign—to act as couriers for the United States courts and ensure that the mailing is actually delivered overseas to the Minister of Foreign Affairs, including by using the foreign state's secure diplomatic pouch to accomplish delivery. JA214 & n.3. Ultimately, given that there could be hundreds of millions or billions in default judgments if the embassy fails to properly handle the mailing, they would need to become far more reticent about accepting mail deliveries, and may end up adopting specific policies limiting the mail that they are willing to receive. For embassies to limit their communications with the host state in order to avoid complicated issues of service—or worse yet, massive default judgments—would undermine their ability to perform their diplomatic mission.

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addressee was no longer "the Minister of Foreign Affairs of Sudan at the time the package was sent.").

Service is also different from simply mailing a letter. It is a uniquely governmental function that represents an assertion of jurisdiction over the recipient, ordering it to appear and defend itself before a U.S. court. Even delivery of service by mail is uniformly viewed as an affront to the foreign sovereign and a breach of the inviolability of diplomatic premises. *See* Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 124 (4th ed. 2016) ("The view that service by post on mission premises is prohibited seems to have become generally accepted in practice.").

As the United States further observed in its *amicus* brief requesting reconsideration by the Second Circuit, the Second Circuit's decision also impinges upon the dignity of the diplomatic mission, as it "dictate[s] the internal procedures of the embassy of another sovereign" by "instructing it to use its [diplomatic] pouch to deliver items to its officials on behalf of a third party." JA203. Diplomatic agents are not couriers or agents for delivery of parcels to their home country, and should not be required to act as such by U.S. law.

That service on a foreign state via its embassy is not in accord with the text or the principles of the VCDR is further supported by the international practice of rejecting any attempt to serve process on a foreign state via its embassy or diplomatic personnel. *See, e.g., Kuwait Airways Corp. v. Iraqi Airways Co. & Republic of Iraq* [1995] 1 WLR 1147 (UKHL) (United Kingdom's highest court rejecting service on the Iraqi embassy with a "request . . . to forward the writ . . . to the Iraqi Ministry of Foreign

Affairs"); *Sistem Mühendislik Insaat Sanayi Ve Ticaret Anonim Sirketi v. Kyrgyz Republic*, [2015] 126 O.R. (3d) 545 (Can. Ont. C.A.) (Canadian appellate court rejecting service on the Kyrgyz Embassy and noting that "service on an embassy is not available as a means of effecting service on a foreign state"); *see also Sebina v. South African High Commission* 2010 3 BLR 723 IC (Botswana court rejecting personal service ostensibly accepted by the South African High Commission[9]); *Village Holdings Sdn. Bhd. v. Her Majesty the Queen in Right of Canada* [1988] 2 MLJ 656 (Malaysian court rejecting personal service upon the Queen by leaving papers at the Canadian High Commission). Such international practice confirms that other signatories to the VCDR do not allow for service on, via, or through an embassy, opinions which are "entitled to considerable weight" in interpreting a treaty. *See Abbott v. Abbott*, 560 U.S. 1, 16 (2010) (interpreting a treaty in part by conducting a "review of the international case law").

Significantly, neither Plaintiff in this case nor the Second Circuit has cited to *any* state party to the VCDR that allows service of process on a foreign state via its embassy. So far in this case, six separate parties to the VCDR—Sudan, the United States, the United Arab Emirates, Saudi Arabia, Libya, and Austria—have all written to indicate that they agree that service of process via an embassy is not allowed by the treaty. As this Court has previously explained, "[w]hen the parties to a treaty

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[9] States in the Commonwealth of Nations refer to their diplomatic missions as High Commissions rather than embassies.

both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, *we must*, absent extraordinarily strong contrary evidence, *defer to that interpretation.*" *Sumitomo Shoji Am. v. Avagliano*, 457 U.S. 176, 185 (1982) (emphasis added). The parties to the VCDR agree that the treaty does not allow service of process either *on* or *via* an embassy, and this Court should defer to that interpretation.

Requiring foreign embassies to handle service is detrimental to the important purposes that diplomatic missions serve in the United States, and undermines one of the fundamental principles of international diplomacy—the inviolability of diplomatic missions. It also diverges from the understanding of the parties to the VCDR, who agree that service via an embassy is not allowed. The United States also has a strong interest in treating foreign embassies as it wants its own embassies to be treated abroad. If the Second Circuit's reasoning is adopted by this Court, then the United States would be subject to similar modes of service (and potential default judgments) on its embassies around the world.

II. CUSTOMARY INTERNATIONAL LAW SPECIFICALLY CONTEMPLATES SERVICE OF PROCESS ON A STATE'S MINISTRY OF FOREIGN AFFAIRS.

Customary international law on diplomatic immunity has recently reaffirmed that foreign sovereigns should be served via delivery to a state's ministry of foreign affairs. In 2004, the United Nations General Assembly adopted, without dissent, the Convention on Jurisdictional Immunities of

States and their Property ("the 2004 Convention"). G.A. Res. 59/38, Annex, U.N. Doc. A/RES/59/38 (Dec. 2, 2004). While the 2004 Convention has not yet entered into force, the European Court of Human Rights and the French Supreme Court—the *Cour de Cassation*—have recognized that its principles constitute customary international law. *See Wallishauser v. Austria*, Application No. 156/04, Judgment, 19 November 2012 (ECtHR) (finding that the 2004 Convention constitutes customary international law binding on both Austria and the United States for purposes of service of process on a foreign sovereign); *La société NML Capital v. La République argentine*, Cour de cassation [supreme court for judicial matters] 1e civ., March 28, 2013, Judgment No. 394 (acknowledging that the 2004 Convention reflects customary international law). Article 22 of the 2004 Convention, much like the FSIA in 28 U.S.C. § 1608(a)(1) and (2), allows for service by special arrangement or international convention. But if neither of these means is available, then the 2004 Convention contemplates "transmission through diplomatic channels *to the Ministry of Foreign Affairs* of the State concerned," and provides that "Service of process . . . is deemed to have been effected *by receipt of the documents by the Ministry of Foreign Affairs*." 2004 Convention, art. 22(1)(c)(i),(2) (emphasis added).[10]

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[10] Further support for the conclusion that this principle constitutes customary international law is found in statutes and international treaties which similarly require service on the foreign state's ministry of foreign affairs. *See, e.g.*, European Convention on State Immunity, ETS No. 074, Art. 16(2) ("The competent authorities of the State of the forum shall transmit [service] . . . to the Ministry of Foreign Affairs of the defendant

The 2004 Convention was based upon earlier work done by the International Law Commission, which in 1991 published draft articles on jurisdictional immunities.[11] The commentary to the ILC Draft Articles—which are substantially similar to the 2004 Convention—explains that "[s]ince the time of service of process is *decisive* for practical purposes . . . in the case of transmission through diplomatic channels *or by registered mail*, service of process is deemed to have been effected on the day of receipt of the documents *by the Ministry of Foreign Affairs*." ILC Yearbook, 1991, Vol. II, Part 2, p. 60, § 3 (emphasis added). The commentary further notes that "too liberal or generous a regime of service of process . . . could result in an *excessive number of judgments in default* of appearance by the defendant State." *Id.* § 1 (emphasis added).

Customary international law thus recognizes that, absent other specifically agreed upon means, the only effective way to serve process on a foreign sovereign—including by "registered mail"—is by service on "the Ministry of Foreign Affairs." This is confirmed by the practice of foreign courts discussed above in refusing to allow service on embassies and

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State."); UK State Immunity Act 1978, Ch. 33, § 12(1) ("Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted . . . to the Ministry of Foreign Affairs of the State."); Singapore State Immunity Act 2014, Ch. 313, § 14(1) (same); Malawi Immunities and Privileges Act 1984 § 14(1) (same); Gamal Badr, *State Immunity: An Analytical and Prognostic View* 214 (1984) (recognizing the same under the laws of Pakistan).

[11] *See* ILC Draft Articles on Jurisdictional Immunities of States and Their Property, ILC Yearbook, 1991, Vol. II, Part 2, p. 60, §§ 1-3.

instead requiring service on the ministry of foreign affairs. *See supra* at 12. Neither the 2004 Convention nor the ILC Draft Articles even mention the possibility of serving process on a foreign state via that state's embassy. They thereby reaffirm the VCDR's prohibition on the use of embassies for service of process upon a foreign state.

III. THIS COURT SHOULD CONSTRUE THE FSIA SO AS NOT TO CONFLICT WITH INTERNATIONAL LAW.

As discussed above, serving process *on* or *via* an embassy is a violation of the VCDR, and customary international law requires delivery to the ministry of foreign affairs. The VCDR was ratified by the United States in 1972,[12] while the FSIA was adopted in 1976.[13] As a later enacted statute, the FSIA will supersede the VCDR *only* "if the purpose of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled." Restatement (Third) of the Foreign Relations Law of the United States § 115 (Am. Law Inst. 1986); *see also* Restatement (Fourth) of Foreign Relations Law: Jurisdiction Treaties § 109 TD No 1 (2016)) ("Where fairly possible, courts will construe federal statutes to avoid a conflict with a treaty provision.").

As Chief Justice Marshall long ago explained, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Schooner*

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[12] 23 UST 3227, TIAS 7502 (1972).

[13] PL 94–583 (HR 11315), PL 94–583, October 21, 1976, 90 Stat 2891.

Charming Betsy, 6 U.S. 64, 81 (1804). This rule of statutory construction has repeatedly been applied by this Court to interpret acts of Congress in order to avoid conflict with earlier treaty provisions and customary international law. *See Weinberger v. Rossi*, 456 U.S. 25, 33 (1982) (construing the words of a statute in accordance with "principles of international law"); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963) (construing the National Labor Relations Act not to apply to foreign-flagged vessels in order to avoid a conflict with international law); *Chew Heong v. United States*, 112 U.S. 536, 539-40 (1884) (interpreting later immigration laws in accordance with earlier treaty rights governing the ability of a resident alien to reenter the country).

As Justice Rehnquist explained in *Weinberger v. Rossi*, in construing a statute, "some affirmative expression of congressional intent to abrogate the United States' international obligations is required in order to construe" the statute to conflict with earlier treaties. 456 U.S. at 32. Similarly, in *Benz v. Compania Navera Hidalgo, S.A.*, this Court observed that several proposals had been made to extend the Seaman's Act to foreign ports, but that "[a] storm of diplomatic protest resulted," with eight countries joining "in vigorously denouncing the proposals." 353 U.S. 138, 146 (1957). The Court observed that it would not "read into the Labor Management Relations Act an intent" to apply the law in breach of international law, and observed:

> For us to run interference in such a delicate field of international relations *there must be present the affirmative*

> *intention of the Congress clearly expressed.* It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain.

Id. at 147 (emphasis added).

In this case, five separate foreign sovereigns have already protested the Second Circuit's decision at the Petition for Certiorari stage. These sovereigns have observed that allowing service of process via an embassy will create "international discord" and invite "retaliative action." *See, e.g.*, Brief of the Kingdom of Saudi Arabia as *Amicus Curiae* in Supp. Of the Pet. For Cert., Apr. 10, 2017, at 17 ("If the United States allows service of process by mailings to embassies, that practice will inevitably have reciprocal consequences outside the United States . . . .").

In this case, there was absolutely no affirmative indication of an intent by Congress to use the FSIA to abrogate the protections of the VCDR. Indeed, in drafting the FSIA, Congress was attempting to codify the principles of sovereign immunity "recognized in international law." *See* H.R. Rep. No. 94–1487, at 2 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6605. Further, the House Report noted that changes to the statute precluded a mailing "to a diplomatic mission of the foreign state . . . so as to avoid questions of inconsistency with section 1 of Article 22 of the Vienna Convention." *Id.* at 26. The legislative history thus reveals a specific intent to avoid conflict with the VCDR, rather than

any "affirmative expression" of an intent to supersede the VCDR.

Given the clarity of both the legislative history and the international discord that would result, this Court should apply its longstanding rule of statutory construction and construe the FSIA in accordance with the VCDR and customary international law to provide that service under 28 U.S.C. § 1608(a)(3) must be made on the foreign state's ministry of foreign affairs and cannot be made on a foreign state's embassy in the United States. It should be up to the legislature, rather than the courts, to make any changes to the statute.

IV. SERVICE OF PROCESS ON AN EMBASSY REQUIRES "CONSENT OF THE HEAD OF THE MISSION."

The above analysis should conclude this Court's consideration of the case. If, however, this Court were not to adopt the above construction of the FSIA, there is an independent ground upon which the Second Circuit's decision should be reversed and delivery of service to the Sudanese embassy should be found to violate the requirements of the VCDR.

The Second Circuit's analysis of the FSIA allowed for the possibility of delivery to the "head of the ministry of foreign affairs" *via* the foreign embassy. But as the Second Circuit itself acknowledged in its opinion on rehearing, delivery to a foreign embassy cannot take place "except with the consent of the head of the mission." JA223 (quoting VCDR, art. 22(1)). The Second Circuit's holding thus rests on its determination that the "Embassy's

acceptance of the service package surely constituted 'consent'" under the VCDR. *Id.* (emphasis added).

But this determination is incorrect as a matter of interpretation of the VCDR, which does not simply require some form of "consent," but specifically requires the consent *"of the head of the mission."* *See* VCDR, art. 22(1) (emphasis added). The "head of the mission" is a specific individual defined by the text of the VCDR as the person "charged by the sending State" with that duty. VCDR, art. 1(a). Specifically, the "head of the mission" may only take up his post after "present[ing] his credentials" to the receiving State. VCDR, art. 13(1). "Heads of mission" are explicitly identified as one of three classes: "ambassadors," "envoys," or "*chargés d'affaires.*" VCDR, art. 14.[14]

The VCDR contains guidance regarding the "members of the staff of the mission," which includes the "members of the diplomatic staff, of the administrative and technical staff and of the service staff." VCDR, art. 1(c). The "administrative staff" is employed in the "administrative . . . service of the mission." *Id.*, art. 1(f). Only the "diplomatic staff," however, "should in principle be of the nationality of the sending State." *Id.*, art. 8(1). The U.S. State Department explains that "[w]hile Americans work at embassies and consulates, most of the staff comes from the host country,"[15] and the State Department

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[14] Other heads of mission of equivalent rank are also allowed by the VCDR, including nuncios and internuncios from the Holy See, High Commissioners within the Commonwealth, etc.

[15] U.S. State Department, *What is a U.S. Embassy?*, https://diplomacy.state.gov/discoverdiplomacy/diplomacy101/places/170537.htm (last visited August 22, 2018).

fills positions such as "Mailroom Clerk" in its embassies with host country nationals.[16] Thus, the individual receiving the mail is not the "head of the mission" or even a member of the diplomatic staff, but possibly not a national of the foreign state at all. Such an individual is neither competent nor authorized to make decisions regarding acceptance of legal process on behalf of the foreign state.

Courts interpreting similarly worded treaties have required the consent of the specified individual for purposes of accepting service of process. Both the Eleventh and D.C. Circuits, for example, have considered similar language under an international treaty between Austria and the Organization of the Petroleum Exporting Countries ("OPEC") that allows service only with the "consent of . . . the [OPEC] Secretary General." *See Prewitt Enters. v. OPEC*, 353 F.3d 916, 923 (11th Cir. 2003); *Freedom Watch, Inc.* v. *OPEC*, 766 F.3d 74 (D.C. Cir. 2014).[17] In

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[16] See, e.g., *United States Mission Vacancy Announcement: Mailroom Clerk*, https://ca.usembassy.gov/wp-content/uploads/sites/27/2016/04/16-44-Mailroom-Clerk-Toronto.pdf (last visited July 25, 2015) (offering a position as a "Mailroom Clerk" in charge of "unclassified mail" at the U.S. Embassy in Ottawa, Canada to host-country nationals).

[17] As the Eleventh Circuit noted, similar treaty provisions requiring consent by a specified individual are found in Headquarters Agreements between sovereign states and international organizations around the world. *Prewitt*, 353 F.3d at 923 n.12. One such example is the United Nations Headquarters Agreement, which states that "The headquarters district shall be inviolable. . . . The service of legal process, including the seizure of private property, may take place within the headquarters district *only with the consent of* and under conditions approved by *the Secretary-General*." *See* United

Prewitt, as in this case, the pleadings were sent by "registered mail, return receipt requested." *Prewitt*, 353 F.3d at 919. "The pleadings were signed for, stamped 'received' by OPEC's Administration and Human Resources Department, and forwarded to the Director of OPEC's Research Division as well as other departments including the Secretary General's office." *Id.* at 919-20. Possibly relying on the ineffective service, "the Secretary General decided that the OPEC Secretariat would not take any action with regard to the summons and complaint." *Id.* at 920. As in this case, when the defendant failed to appear, the trial court rendered a default judgment. *Id.* OPEC then made a special appearance to challenge service, and the Eleventh Circuit determined, based on the wording of the treaty, that the acceptance of a service mailing by OPEC did not constitute the "consent of . . . the [OPEC] Secretary General" and that service was therefore ineffective. *Id.* at 925.

The D.C. Circuit followed this reasoning in *Freedom Watch*, where the plaintiff attempted to deliver service "by hand to OPEC headquarters in Vienna, where an individual ostensibly accepted service." 766 F.3d at 77. The D.C. Circuit found that without the consent of OPEC's Secretary General, service was ineffective, despite the ostensible acceptance of a service package by an employee. *Freedom Watch*, 766 F.3d at 80.

In the *Hellenic Lines* case, the D.C. Circuit explained what "consent" in this context would

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Nations Headquarters Agreement, Art. III, § 9, *available at* 22 U.S.C. § 287 (emphasis added).

require. As noted above, *Hellenic Lines* involved an attempt to serve an ambassador with a complaint against "his sending state." *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 980 (D.C. Cir. 1965). The D.C. Circuit noted that "an ambassador may be served if he consents to service," but posited that the burden of securing such consent "should rest on the party seeking service." *Id.* n.3. The concurrence noted that the plaintiff would need to make a "showing that the Ambassador has consented, or is authorized, to accept service on behalf of the government which he represents for diplomatic purposes in this country." *Id.* at 981-82 (Washington, J., concurring). The concurrence also stated that "informal inquiries" had been made as to "whether the Embassy of Tunisia would be willing to accept service of summons in this case," and determined that it was "unwilling to accept service of process." *Id.* at 982. Thus, without express advance consent from the embassy, process could not be served on the foreign state via the embassy or its personnel. *Id.* at 983.

The Second Circuit's finding that acceptance of registered mail by a mailroom employee constitutes implied "consent" by the "head of the mission" is squarely at odds with the text of the VCDR, the holdings of *Prewitt* and *Freedom Watch*, and the dicta from *Hellenic Lines* that actual consent by the specified individual is required. Securing such consent prior to delivery would obviate many of the foreign policy concerns present in this case, as a senior diplomatic official from a foreign government would have agreed to service of process, and would be taking responsibility for ensuring service to the Head of the Ministry of Foreign Affairs.

Amici curiae believe that the FSIA should be construed to require service to be sent to the ministry of foreign affairs, in accordance with customary international law. It would, however, be in accord with the VCDR if this Court were to instead find that service can be made on an embassy if there is specific "consent by the head of the mission" to accept such service, with the burden on the plaintiff to specifically establish such "consent by the head of the mission." However, because the certified mail return provided by the Respondents in this case does not indicate any consent, or indeed any involvement, by the Sudanese Ambassador, the plaintiff has failed to establish proper service of process on Sudan.

CONCLUSION

For the foregoing reasons, *amici curiae* international law professors respectfully request that the decision of the Second Circuit be reversed.

Respectfully submitted,

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Case No. 16-1094

In the Supreme Court of the United States

REPUBLIC OF SUDAN,

Petitioner,

v.

RICK HARRISON, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE KINGDOM OF SAUDI ARABIA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

Amicus curiae the Kingdom of Saudi Arabia (the "Kingdom") is a foreign sovereign and an international ally of the United States.[1] It submits this brief to assist the Court in understanding the crucial importance of the inviolability (and attendant immunity from service of process) of embassies and other missions of foreign states to the United States. The Second Circuit's decision squarely violates international law principles codified in the Vienna Convention on Diplomatic Relations and companion treaties; decades of practice under the consistent decisions of the U.S. court of appeals and customary international law; and the United States government's own longstanding position as expressed in its brief in this case, in diplomatic communications, and to courts around the world.

The Kingdom has a robust diplomatic presence in the United States through its embassy in Washington, its consulates in New York, Houston and Los Angeles, and its United Nations mission in New York. As much as any foreign state, the Kingdom has a strong interest in preserving the inviolability of foreign missions, including the longstanding prohibition against serving legal process at mission premises. That prohibition, rooted in international law, is reflected in U.S.

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[1] This brief is filed under the blanket consent letters submitted by the parties on August 10, 2018. Counsel of record for each party has received notice of *amicus curiae*'s intention to file this brief. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission.

domestic law through the Foreign Sovereign Immunities Act ("FSIA") provisions regulating how legal process may be served in actions against a foreign state. Strict adherence to these principles has a direct and recurring practical impact on the Kingdom, which (along with its agencies and instrumentalities) often faces improper attempts at service of legal process at its U.S. embassy, consulates, and U.N. mission. *See, e.g.*, Summons, *862 Second Ave. LLC* v. *2 Dag Hammarskjold Plaza Condos.*, No. 1:16-cv-08551 (S.D.N.Y. Nov. 2, 2016), ECF No. 1 (service of summons and complaint attempted by delivery to receptionist at the Kingdom's Consulate General in New York). As the Kingdom does not have a standing special arrangement, and is not a party to any convention providing for service of process in U.S. legal matters, the Kingdom has a particular interest in ensuring that U.S. litigants adhere to the service methods provided in the FSIA, 28 U.S.C. §1608(a), which do not disturb the mission-inviolability protections of the Vienna Convention.

Allowing service of process by delivery to an embassy or mission would also create a host of practical problems for the Kingdom and other foreign sovereigns, not least of which would be complicating efforts to ensure an organized and timely response to U.S. litigation. The Second Circuit's decision is especially problematic as it casts doubt on the inviolability of missions to the United Nations in New York. For these reasons, the Kingdom urges this Court to reverse the decision of the Second Circuit and affirm the inviolability

protections Congress established in Section 1608(a) for embassies and missions.

SUMMARY OF ARGUMENT

This Court should reverse the Second Circuit's aberrational holding, which is at odds with decades of law and consistent practice under the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, and the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1608 (2017). The Second Circuit held that service of process on a foreign state can be made "via" its U.S. embassy. The Vienna Convention prohibits such transgression on the inviolability of a foreign mission, and the FSIA in these circumstances authorizes service only on a sovereign state's minister for foreign affairs.

The inviolability of foreign missions under Article 22 of the Vienna Convention codifies longstanding custom and practice that serve as the foundation of modern diplomacy. The United States, the Kingdom, and countries across the globe have long taken the position that, as a result of the inviolability of foreign missions, service of process cannot be made on an embassy or mission. In fact, upon the urging of the State Department, Congress modified an earlier version of Section 1608 of the FSIA to eliminate provisions that would have allowed service via a foreign state's embassy.

Disregarding this test and history, the Second Circuit held that plaintiffs attempting to sue a foreign state under the Foreign Sovereign Immunities Act may serve process "by sending a copy of the summons and complaint and a notice of

suit ... to the head of the ministry of foreign affairs of the foreign state," 28 U.S.C. §1608(a)(3) (emphasis added), through the expedient of merely sending the legal papers "through," "via," or "care of" the foreign state's diplomatic mission in Washington, D.C. This artificial distinction between service "on" an embassy (which the decision below recognized as improper) and service "via" an embassy violates both the Vienna Convention and the FSIA. Service "via" an embassy is nothing but semantics when, as in this case, the district court found that service was effective when the *embassy* received the package—not when it was received by the minister for foreign affairs. That holding allows American plaintiffs to either commandeer a foreign sovereign's diplomatic pouch, a practice forbidden by Article 27 of the Vienna Convention and international practice, or else to risk a lack of notice entirely if the mailing does not reach the foreign minister. The decision below also directs courts to violate Section 1608(a)(3)'s requirement that service be "addressed and dispatched" to the foreign minister.

As explained by the United States here and below, the Second Circuit's decision contradicts the Executive Branch's longstanding and unbroken position on service based on the inviolability of embassies under the Vienna Convention. U.S. Br. 7-9; Pet App. 135a-147a. The U.S. regularly refuses to acknowledge service by mail on its embassies and other international facilities, properly requiring that official notice of the case be submitted by diplomatic channels. This position is substantially undermined by the Second Circuit's decision.

Finally, the Second Circuit's decision raises practical difficulties that could cause serious diplomatic friction. A plaintiff may never learn when service is complete as embassies may not indicate whether and when the service of process has arrived at the office of the foreign minister. Embassies may also feel constrained to discard or reject all forms of legal correspondence, limiting communication in general and in particular the assistance they may receive from lawyers. And foreign courts may allow reciprocal service to be completed on the United States through its own overseas embassies and missions.

The Kingdom respectfully urges this Court to reverse the decision of the Second Circuit.

ARGUMENT

I. The Inviolability Provisions of the Vienna Convention Are Critical to Diplomacy and Foreign Relations.

The Second Circuit's decision extinguishes a critical component of the inviolability for embassies and missions ensured by the Vienna Convention.[2] The Vienna Convention is one of the most universally accepted sources of international law, and it resulted from an American-led effort to codify customary rules of diplomatic relations dating back to the sixteenth century. The practice of granting inviolability to diplomatic premises, persons, and communications, of course, stretches back millennia.

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[2] Similar protections for the inviolability of consulates are codified in the Vienna Convention on Consular Relations, art. 31, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

See United States v. *Enger*, 472 F. Supp. 490, 504 (D.N.J. 1978) ("The ancient Greeks, as the first to regularize diplomatic relations, included in their practice the exchange of ambassadors and concomitant personal inviolability."); Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4th ed. 2016) at 110-11 ("The sovereign State—under the Vienna Convention the receiving State—is under a duty to abstain from exercising any sovereign rights, in particular law enforcement rights, in respect of inviolable premises, persons, or property. The receiving State is also under a positive duty to protect inviolable premises, persons, or property from physical invasion or interference with their functioning and from impairment of their dignity.").

The centerpiece of the Vienna Convention is its codification of diplomatic protection with the "categorical" and "strong" word for the special type of immunity applicable to embassies: "inviolable." *767 Third Avenue Associates* v. *Permanent Mission of the Republic of Zaire to the United Nations*, 988 F.2d 295, 298, 302 (2d Cir. 1993) ("[F]ederal courts must defer to the language of Article 22."). Inviolability is a necessary precondition to open discourse between nations and a key to diplomacy. As the International Court of Justice explained in the case initiated by the United States during the Iran hostage crisis, "[t]here is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose." *Case Concerning*

United States Diplomatic and Consular Staff in Tehran (U.S. v. *Iran)*, 1979 I.C.J. 7, 19 (Dec. 15).

The inviolability provisions of Article 22 of the Vienna Convention negate the prospect of service of process on an embassy. Instead, service can be accomplished by direct mail to the head of the ministry of foreign affairs of the foreign state under Section 1608(a)(3), unless the foreign state refuses to accept service (as is the practice of the United States, as explained below). In that case, service via diplomatic channels may be accomplished under Section 1608(a)(4) through the State Department.[3] The Department of State will ensure "transmission through diplomatic channels to the Ministry of Foreign Affairs of the state concerned." David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 AM. J. INT'L L. 194, 208 (2005).

Early drafts of the Vienna Convention contemplated specifying certain exceptions to inviolability, but most were ultimately rejected to avoid creating exceptions that might later swallow the rule. *See* Rene Värk, *The Siege of the Estonian Embassy in Moscow: Protection of a Diplomatic Mission and Its Staff in the Receiving State*, XV JURIDICA INT'L 144, 146 (2008). Indeed, records from the negotiation show that one delegate withdrew a proposed clarification regarding service once he was satisfied that "it was the unanimous interpretation

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[3] *See* U.S. State Department, Bureau of Consular Affairs, *How do I effect service on a foreign state or political subdivision?*, *at* https://travel.state.gov/content/travel/en/legal-considerations/judicial/service-of-process/foreign-sovereign-immunities-act.html (last visited Aug. 22, 2018).

of the Committee that no writ could be served, even by post, within the premises of a diplomatic mission." United Nations Conference on Diplomatic Intercourse and Immunities, Vienna, Austria, March 2 – April 14, 1961, Vol. I: Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole (1962), U.N. Doc. A.Conf.20/14, at 141.

This understanding that no writ could be served by mail on an embassy was also enacted directly into U.S. law through 28 U.S.C. § 1608(a)(3). *See Autotech Technologies LP* v. *Integral Research & Development Corp.*, 499 F.3d 737, 748-49 (7th Cir. 2007) (rejecting "service through an embassy" as violating both the Vienna Convention and § 1608(a)(3)). In fact, Congress amended the initial draft of the nascent Foreign Sovereign Immunities Act "to exclude the possibility" of service by "mail to the head of mission" in response to the State Department's position on that issue. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* at 124-25; *see also* Arthur Rovine, *Contemporary Practice of the United States Relating to International Law*, 69 AM. J. INT'L L. 146, 146-47 (1975) (noting State Department position that Vienna Convention signatories "would have a basis for objection to the propriety of process served in this manner under Article 22"); H.R. Rep. No. 94-1487, at 11, 26 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6609, 6625 ("A second means of [service of process of] questionable validity, involves the mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state. Section 1608 precludes this method so as to avoid questions of inconsistency

with section 1 of article 22 of the Vienna Convention on Diplomatic Relations .... **Service on an embassy by mail would be precluded under this bill.**") (emphasis added).

As finally enacted by Congress, Section 1608 did not include any language about embassies or missions, keeping them properly separate from the methods of service of process under the FSIA. Indeed, the *only* reference to diplomatic or consular missions in the entire FSIA is Section 1610(a)(4)(B)'s assurance that property "used for purposes of maintaining a diplomatic or consular mission" will remain immune from attachment and execution, regardless of any judgment that may be obtained.

That Congress changed Section 1608 to *eliminate* service of process by mail on an embassy to satisfy the inviolability requirement of Article 22 shows that the Second Circuit went astray when interpreting Section 1608 to *allow* service by mail "via" the embassy. There is nothing in the FSIA that supports the creation of exceptions to the inviolability of embassies and missions under international law and the Vienna Convention.

The Vienna Convention states that the "privileges and immunities" are necessary "to ensure the efficient performance of the functions of diplomatic missions as representing States." Vienna Convention, Preamble. Like the United States, the Kingdom views the inviolability protections enshrined in the Vienna Convention as necessary to ensure the smooth functioning of embassies and missions, to avoid disputes about the propriety of service of process on a sovereign, and to maintain

continuous and cooperative diplomacy between nations.

II. The Second Circuit's Decision Misinterprets U.S. Law and Violates the Vienna Convention, Creating a Host of Practical Problems for Foreign States.

A. The Decision Below Stands in Direct Conflict With the Text of the Vienna Convention and 28 U.S.C. § 1608(a)(3).

This Court should reverse the Second Circuit's decision because it violates the United States' express obligations under the Vienna Convention and misinterprets the language of 28 U.S.C. § 1608(a)(3).

1. Inviolability under the Vienna Convention and Section 1608(a) means that foreign sovereigns are absolutely immune from service of process through their embassies, as explained above. *Kumar* v. *Republic of Sudan*, 880 F.3d 144, 158 (4th Cir. 2018) ("the legislative history, the Vienna Convention, and the State Department's considered view ... mean that the statute does not authorize delivery of service to a foreign state's embassy"); *Barot* v. *Embassy of the Republic of Zambia*, 785 F.3d 26, 27-30 (D.C. Cir. 2015) (agreeing with district court's rejection of "attempted service at the Embassy in Washington, D.C., rather than at the Ministry of Foreign Affairs in Lusaka, Zambia, as the [Foreign Sovereign Immunities] Act required"); *Hellenic Lines, Ltd.* v. *Moore*, 345 F.2d 978, 980 (D.C. Cir. 1965) (noting that "the Ambassador's diplomatic immunity would have been violated by any

compulsory service of process"). The Second Circuit circumvented this immunity by drawing an artificial distinction between service "on" an embassy and service "via" an embassy. But the proceedings in this case reveal any such distinction as meaningless. Both Plaintiffs and the district court in the underlying action treated the time of delivery to the embassy, not the time of delivery to the foreign minister's office, as the triggering event for finding that service was complete.

The lower courts held that the service package in the underlying case was delivered to the Sudanese embassy in Washington, D.C. in mid-November 2010. *Compare* Pet. App. 5a (the court of appeals stating that service occurred by November 23), 27a (the district court stating that service occurred on November 17), 134a (receipt showing delivery to Charlotte Hall, Maryland on November 18). Plaintiffs moved for entry of default on January 18, 2011 and the district court entered a clerk's default the very next day—roughly sixty days after the package purportedly arrived at the embassy. *See* Pet. App. 27a-28a. As Section 1608(d) gives a foreign sovereign sixty days to answer, the district court and Plaintiffs clearly did not believe they needed to wait even one day to account for delivery from the embassy to the office of the foreign minister in Sudan. The court of appeals similarly treated the date of delivery to the *embassy* as the date on which service was complete under Section 1608(c)(2).

The fact that default was sought and received almost exactly 60 days after the package was purportedly delivered to the embassy demonstrates that the "transmittal" of the papers from the

embassy to the foreign minister is irrelevant to service in the Second Circuit's eyes. In other words, *if the service is complete upon delivery to the embassy, rather than upon delivery to the foreign minister, then service is not "via" the embassy at all—but "on" the embassy.* This result shows that service "on" an embassy and service "via" an embassy is a distinction without any practical difference.

2. The Second Circuit's decision also transgresses Article 27 of the Vienna Convention by allowing domestic courts to commandeer another sovereign's diplomatic pouch for its own uses. The Second Circuit held that service through an embassy is preferable to the alternatives because "mail addressed to an embassy ... can be forwarded to the minister by diplomatic pouch," comparing diplomatic pouches to "DHL" and other "commercial carrier[s]," and suggesting that each should be equally accessible to an American litigant. Pet. App. 14a. The notion that an American court can dictate the contents of a diplomatic pouch for *mere convenience* of a litigant is repugnant to basic norms of international law. *See also* Pet. App. 144a (the U.S. brief in the court below stating that "one sovereign cannot dictate the internal procedures of the embassy of another sovereign").

In contrast to the Second Circuit's decision, Article 27.3 of the Vienna Convention explicitly states that "official correspondence" of a mission "shall be inviolable" and that the "diplomatic bag shall not be opened or detained." U.S. law recognizes the same privileges, stating that "[d]iplomatic bags shall not be opened or detained nor shall they be subject to duty or entry."

Diplomatic and Consular Bags, 19 C.F.R. 148.83 (2018); *see also* U.S. State Department, Diplomatic Note No. 12-306 at 3 (Nov. 9, 2012), at: https://www.state.gov/documents/organization/200674.pdf (diplomatic pouches are inviolate and even "inspection of a pouch by means of an X-ray" would be "a serious breach of the clear obligations of the VCDR"). The Second Circuit ignored inviolability by holding that courts and litigants can effectively dictate the contents of a diplomatic bag. *See also* Diplomatic Note No. 12-306 at 5-41 (detailing complex procedures that must be followed for overseas transport of diplomatic bags).

In addition, the Vienna Convention states that the "diplomatic bag ... may contain only diplomatic documents or articles intended for official use." *See also Yearbook of the International Law Commission 1958, Vol. II*, U.N. Doc. A/CN.4/SER.A/1958/Add.1 at 97 (emphasizing "the overriding importance which [the Commission] attaches to the observance of the principle of the inviolability of the diplomatic bag"). This provision of the Vienna Convention has also been enacted into U.S. law. *See* Diplomatic and Consular Bags, 19 C.F.R. 148.83 (2018) ("The contents of diplomatic bags are restricted to diplomatic documents and articles intended exclusively for official use..."). Litigation documents from private civil suits do not transform into "diplomatic documents" merely because they have been dropped off at an embassy.

Diplomatic missions of foreign states and their diplomatic bags are inviolate under both U.S. and international law. They should not be treated by U.S. courts as a "free" and secure parcel service to

transmit documents to an overseas foreign minister. This Court should accordingly reverse the Second Circuit's erroneous interpretation of the FSIA and the Vienna Convention given its impact on (among other things) diplomatic bags.

3. The Second Circuit's decision also eliminates the statutory requirement that the clerk of court address and dispatch the documents to the foreign minister. 28 U.S.C. § 1608(a)(3) explicitly requires that service be "***addressed and dispatched*** by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned" (emphasis added). The Second Circuit would allow the lower courts to address and dispatch the process to an embassy, not to the foreign minister—using the *embassy's* address and not the *minister's* address. The embassy, not the court, would then be expected to ensure that service be "addressed and dispatched" to the correct address head of the ministry of foreign affairs. Relying on the embassy to perform the statutory requirements in its place, a court following the Second Circuit's rule would violate Section 1608(a)(3) and place the United States in breach of its obligations under the Vienna Convention.

Section 1608(a) ensures that actual notice occurs in a way consistent with customary international law and the Vienna Convention. Receipt of the service packet is either *agreed to* by the foreign sovereign under subsections (a)(1) and (a)(2), is *expressly acknowledged* by the foreign sovereign under subsection (a)(3), or is delivered via *established diplomatic channels* under subsection (a)(4). This Court should not ignore Congress'

careful strictures on service and allow process to be accepted by security guards or mailroom employees at far-flung embassies or missions—a common tactic in FSIA cases. *See, e.g., Simons* v. *Lycee Francais De N.Y.*, No. 03-cv-4972, 2003 U.S. Dist. LEXIS 17644, at *6 (S.D.N.Y. Oct. 7, 2003) (rejecting claim that security guard or other embassy employees can accept service under any provision of § 1608); *Sabbagh* v. *U.A.E.*, No. 02-cv-1340, 2002 U.S. Dist. LEXIS 26380, *6 (Dec. 10, 2002) ("The Court is not persuaded that plaintiff can satisfy the strict requirements for service on a foreign sovereign under § 1608 merely by having its process server procure the consent of a low-level official at the time of service.").

Not only does the Second Circuit's decision allow any embassy employee to accept service, it also unmoors Section 1608(a)(3) from the requirement that service occur at the nation's foreign ministry. As the Fourth Circuit recently explained:

> [T]he view that subsection (a)(3) only requires a particular recipient, and not a particular location, would allow the clerk of court to send service to any geographic location so long as the head of the ministry of foreign affairs of the defendant foreign state is identified as the intended recipient. That view cannot be consistent with Congress' intent: otherwise, service via General Delivery in Peoria, Illinois could be argued as sufficient.

Kumar, 880 F.3d at 155. By requiring delivery to proper person at the proper location, Section 1608(a)(3) ensures that service is not complete

unless is its accepted by someone with the necessary knowledge and responsibility to make an official response on behalf of the sovereign.

4. Finally, the Second Circuit sought to downplay the impact of its ruling in two ways that actually further harm inviolability. It first suggested that a foreign sovereign could reject service of process mailed to an embassy, and faulted Sudan for its failure to do so. Pet App. 101a. This notion imposes an obligation of absolute prescience on low-level embassy employees who must now guess what the contents are of each letter received by the embassy. *Id.* If the mailroom employees guess wrong, they do so (under the Second Circuit's reasoning) as official representatives of the sovereign state. But if such employees were instructed to reject all legal communications, it could chill diplomatic correspondence and attorney-client discussions (if the person receiving the mail did not appreciate whether the correspondence came from the sovereign's counsel or a would-be litigant). This places an intolerable burden on embassies and the employees who work there. It also creates new and unnecessary risks for states maintaining foreign embassies in the United States.

The court below further conjectured that service by mail at the embassy is inconsequential because inviolability means little more than treating the embassy as "an extension of the sovereignty of the sending state," citing *United States* v. *Gatlin*, 216 F.3d 207, 214 n.9 (2d Cir. 2000). Pet. App. 108a. But *Gatlin* itself explains that the notion that embassy premises can be treated merely as part of the foreign state's territory is an "inaccurate fiction."

Gatlin, 216 F.3d at 214 n.9, *quoting* 1 OPPENHEIM'S INT'L LAW § 494, at 1077 nn.15-16 (R. Jennings & A. Watts eds., 9th ed. 1992). The inviolability of embassies goes beyond the deference that states give to the territorial integrity of other states. Indeed, Article 45(a) of the Vienna Convention states that "even in cases of armed conflict," states must "respect and protect the premises of the mission, together with its property and archives." Both the Kingdom and the United States expect other states to zealously "protect the premises of the mission against any intrusion" as a cornerstone of international law and diplomacy. *See* Vienna Convention, Art. 22.

The Second Circuit's decision to treat an embassy as an internal mailroom for the sending state – rather than an inviolable diplomatic presence – would represent a large step backwards from the protections enshrined in the Vienna Convention. This Court should reject both the Second Circuit's decision and its reasoning, and uphold the underlying premises of embassy inviolability reflected in both the Vienna Convention and the FSIA.

B. Vienna Convention Signatories, Including The United States, Agree That Inviolability Forbids Service on a State Through an Embassy or Other Mission.

The United States has consistently taken the position in Saudi Arabia and around the world that no service of process on its embassies, bases, training camps, or other facilities will be recognized

as valid under the Vienna Convention. Like many other signatories, the United States insists that service can only be accomplished through diplomatic channels. As highlighted by the United States, the United States absolutely refuses to recognize the propriety of service of process on United States embassies and missions abroad. U.S. Br. 12-14.

A recent example illustrates how the United States relies on the protections of the Vienna Convention to refuse service on its missions and embassies abroad. When a Jordanian national brought suit in Riyadh against his employer, the U.S. Military Training Mission in Saudi Arabia, a summons was served on an employee at its headquarters. However, the U.S. embassy responded that "under international law, before summoning a foreign entity to attend before the courts or any judicial authority in the country in which it is located, **official notice of the case must be submitted through diplomatic channels**." U.S. Diplomatic Note No. 16-0010, dated December 31, 2015 (translated text; emphasis added). It further stated that the mission "cannot accept documents with respect to legal action against the Government of the United States of America." *Id.* The United States stated that it was "not a party to this case" and that it "will not recognize as valid any award that may be issued against the Government of the United States in this case." *Id.* As explained in its brief, the United States has consistently taken this position before U.S. and foreign courts. U.S. Br. at 12-14.

The Kingdom, like most nations, agrees with the position of the United States. *See* Eileen Denza,

Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations (4th ed. 2016) at 124 ("The view that service by post on mission premises is prohibited seems to have become generally accepted in practice."); *see, e.g.*, Statement of the Canadian Department of Foreign Affairs, Trade and Development, *Service of Originating Documents in Judicial and Administrative Proceedings Against the Government of Canada in other States*, Circular Note No. JLA-1446 (Mar. 28, 2014), *available at* www.international.gc.ca/protocol-protocole/policies-politiques/circular-note_note-circulaire_jla-1446.aspx?lang=eng: ("**Service on a diplomatic mission or consular post is therefore invalid, however accomplished, and additionally constitutes a breach of Article 22 of the Vienna Convention on Diplomatic Relations ...**") (emphasis in original).

The United States risks negative reciprocal action by numerous other foreign states if this Court interprets the Vienna Convention to allow service of process on foreign missions or embassies. In particular, the longstanding U.S. position that service must be accomplished by diplomatic note may be rejected by foreign courts, resulting in service on remote U.S. missions and outposts that may not give the United States actual notice of the lawsuit. A finding that service can be completed at a local U.S. mission may lead other foreign courts to reject otherwise-valid jurisdictional challenges. Just as concerning, it may lead to default judgments and subsequent enforcement actions against the United States in both foreign and domestic courts. In short, proper service of process in accordance with the

inviolability protections of the Vienna Convention is just as important for the United States as it is for every other sovereign that relies on the inviolability of their foreign missions.

C. The Second Circuit's Decision Will Lead To Confusion, Conflict, and Delay.

The Second Circuit's decision also poses serious practical difficulties that create intolerable and unnecessary diplomatic risks. The rule forbidding service on an embassy has roots in historical practice and pragmatism. Simple and direct rules are critical to avoid confusion given the multitude of court systems around the world and to avoid the collision of legal cultures.

Some of the real problems and questions raised by the Second Circuit's decision include deciding when service is complete. Under the Second Circuit's decision, the answer remains unclear. The logic of the statute and the decision point to a date triggered by the actual receipt of the legal papers by the foreign minister, although, as noted above, the courts below treated the date of receipt at the embassy as the date of service. But it is unlikely that the plaintiff or the court could ever learn this date without further intolerable intrusions on the inviolability of the diplomatic pouch. Thus no one may know when service is complete—especially when the document may sit for days or weeks in the embassy before the next pouch is sent (and that pouch might, in some cases, might even not be sent by air). This will unnecessarily complicate deadlines for a response and involve problems of proof of

receipt. And it will ensure a multitude of disputes over the effective date of service.

Similarly, "service via embassy" would not be reliable as a practical matter. Depending on individual practice, many embassies and missions might simply discard or reject any purportedly "legal" mail as misdirected or improperly addressed. Workers in an embassy mailroom will not know which packages to accept, and may be instructed to reject any package mailed by a lawyer or a court to avoid unintentionally accepting service of process. This would call into question any number of important legal and diplomatic communications, as allies and fellow sovereigns attempt to avoid improper service by U.S. plaintiffs. This in turn could lead to a chilling of important communications between embassies, their own counsel, and lawyers for U.S. foreign nationals. In addition, mail addressed to embassies in the U.S., rather than directly to the sovereign's foreign ministry in its own land, might easily be delivered to the wrong U.S. address and not provide any notice at all (as occurred in this case with the delivery in this case to Charlotte Hall, Maryland).

In addition to the risk that foreign sovereigns will not receive actual notice of litigation, the decision below creates problems for foreign states that are attempting to ensure an organized and timely response to U.S. litigation. By imposing these new risks and requirements on embassy and mission employees, the decision increases the costs and risks of maintaining effective diplomacy and communications with the United States. Doubtless these reasons and other have led the United States

to takes the position in foreign courts that service on a mission is inappropriate and a violation of international law. *See, e.g.*, U.S. Diplomatic Note No. 16-0010, dated December 31, 2015.

The Second Circuit's rule also reveals an impossible line-drawing problem and the lack of any tolerable limiting principle. If service on (or "via") an embassy is valid, would service on a military or training base, presence post, foreign interests section, or delegation suffice? If the ability to transmit documents securely is the key, the United States has thousands of entities that might be forced to dispatch service documents worldwide. Confusion will reign supreme.

This confusion is punctuated by the conflict between the Second Circuit's decision and the position of the United States. As explained above, the United States stands on the protections in the Vienna Convention in refusing to recognize any service of process sent to (or through) its own foreign embassies and missions. The decision below undermines that position. This Court has explained that "[i]f the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements." *Vimar Seguros Y Reaseguros* v. *M/V Sky Reefer*, 515 U.S. 528, 539 (1995). The decision below does the opposite by devising a distinction—between service "on" and "via" an embassy—that was previously unknown in either U.S. or international diplomatic law.

The Second Circuit's novel interpretation of the United States' Vienna Convention obligations is especially concerning for all nations, including the Kingdom, with missions at the United Nations. U.N. missions enjoy "immunity from legal process of every kind." Convention on Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15, art. IV, § 11; *see also* Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations ("Headquarters Agreement"), June 26, 1947, 61 Stat. 3416, 11 U.N.T.S. 11, art. III § 9 (the U.N. "headquarters district shall be inviolable"). Indeed, the United States recently submitted a Statement of Interest that service of process on several foreign states' U.N. missions (as well as the Kingdom's Consulate General in New York) "would violate the United States' obligations" under the Vienna Convention and the Headquarters Agreement. Statement of Interest of the United States at 4, *862 Second Ave. LLC* v. *2 Dag Hammarskjold Plaza Condos.*, No. 1:16-cv-08551 (S.D.N.Y. Feb. 17, 2017), ECF No. 76; *see also* Statement of Interest of the United States at 8-9, *Georges* v. *United Nations*, No. 1:13-cv-07146 (S.D.N.Y. Mar. 7, 2014), ECF No. 21 (asserting that "plaintiffs' attempts to serve the UN ... were ineffective"). The Second Circuit's interpretation of diplomatic "inviolability" as not forbidding service of process on missions directly threatens settled law about U.N. missions relied upon by many nations.

The inviolability of foreign missions cannot be diluted by receiving states and their citizens, whether for security or convenience, and the United

States has a long history of remaining steadfast to preserve those ancient privileges for ambassadors and embassies. Reversal is necessary to ensure that the Second Circuit's decision does not strip an important part of the inviolability protections under the Vienna Convention. If the United States allows service of process by mailings to embassies, that practice will inevitably have reciprocal consequences outside the United States, potentially unraveling important principles of the Vienna Convention and customary international law on embassy inviolability. The Kingdom respectfully requests that this Court uphold the inviolability of embassies from service of process under the Vienna Convention and 28 U.S.C. § 1608(a)(3).

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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No. 16-1094

In the Supreme Court of the United States

REPUBLIC OF SUDAN, PETITIONER

v.

RICK HARRISON, ET AL., RESPONDENTS

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR *AMICUS CURIAE* VETERANS OF FOREIGN WARS OF THE UNITED STATES IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Veterans of Foreign Wars of the United States (VFW), a Congressionally chartered veterans service organization established in 1899 with over 1.7 million members, is the nation's largest organization of war veterans and its oldest major veterans' organization. The VFW was instrumental in establishing the Veterans Administration, creating the World War II GI Bill and the Post-9/11 GI Bill, and developing the national cemetery system. Of particular relevance here, since 2002, the VFW annually places a floral memorial on each of the 17 sailors' gravesites on the anniversary of the terrorist attack against the USS *Cole*. The tribute takes place each year at 13 separate cemeteries in eight states across the nation.

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[1] Pursuant to this Court's Rule 37.6, *amicus* Veterans of Foreign Wars affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and its counsel made such a monetary contribution. As required by Rule 37.3(a), this brief is accompanied by the written consent of all parties because petitioner and respondents have filed blanket consents with this Court.

INTRODUCTION

On the morning of October 12, 2000, the USS *Cole* entered the Aden harbor in Yemen for what was intended to be a routine stop. As sailors began refueling and lining up on deck for lunch, a small motorized boat with Al-Qaeda suicide bombers left shore in the direction of the *Cole*. The boat sailed up to the *Cole*'s port side and, without warning, exploded with the force of 700 pounds of C4.

The blast tore open the side of the *Cole*, and triggered flooding that took 96 hours to get under control. But the true loss was the 17 United States sailors who were killed, and the additional 42 who were injured, by the attack. Amid the chaos, the survivors held their composure and maintained the rules of engagement—holding their fire against a second unknown vessel in the harbor.

This atrocity was the deadliest attack on a United States Naval vessel since 1987. It led to multiple lawsuits in which American courts expressly found that the Republic of Sudan (Sudan) helped Al-Qaeda injure and kill Americans. The present action is one such case. It was brought against Sudan by *Cole* sailors wounded in the Al-Qaeda bombing and their spouses (the *Cole* Victims).

The *Cole* Victims sued Sudan under the Foreign Sovereign Immunities Act (FSIA). Although Sudan participated in prior litigation by other *Cole* victims, it failed to appear in this case—notwithstanding dutiful efforts by the *Cole* Victims to provide notice as required by the FSIA. Indeed, on at least five separate occasions, the *Cole* Victims arranged for service by mail or notice of the legal proceedings to the head of the ministry of foreign affairs at the Sudanese embassy in Washington, D.C.

As required, the *Cole* Victims initially proceeded under 28 U.S.C. 1608(a)(3), which authorizes service "by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official

language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." The Sudanese embassy accepted the mail containing the complaint, summons, and notice of lawsuit, signing the receipt for return to the clerk. And shortly after the initial service packet was delivered, an official from the Sudanese embassy met with an attorney for the *Cole* Victims to discuss a potential resolution of the case.

After an evidentiary hearing prescribed by the FSIA, the court entered a default judgment against Sudan. But when the *Cole* Victims went to collect that judgment out of Sudanese assets frozen by the United States, Sudan finally appeared and asked the court to vacate the judgment that the *Cole* Victims spent years to obtain, arguing that 28 U.S.C. 1608(a)(3) does not permit Sudan to be served with a lawsuit via mail to its embassy in Washington, D.C. The decision below rejected Sudan's position. Now, this Court will decide whether Sudan will be able to hide its body count by misconstruing our laws.

SUMMARY OF ARGUMENT

In this case, the *Cole* Victims seek compensation for their losses from Sudan, a 25-year state sponsor of terrorism that provided Osama bin Laden with financing, a safe haven, access to its banking system, and organizational support. It is precisely for cases like this one that Congress created—and then steadily expanded—the terrorism exception to the FSIA.

Sudan waited until a default judgment was entered against it to make an appearance in this case. It argued, as it does in this Court, that the default judgment must be vacated because the service packet was sent to Sudan's foreign minister at the Sudanese embassy in the United

States, rather than the Sudanese foreign ministry in Sudan. The Second Circuit rejected this argument, reasoning that Section 1608(a)(3) did not specify a location to which the mailing must be sent, JA 178, and dismissing any concern that mail service via an embassy would violate international law, JA 182.

This Court should affirm the Second Circuit's determination that 28 U.S.C. 1608(a)(3) authorizes service by return mail sent to, and accepted, by a foreign minister at his or her country's United States embassy. As the *Cole* Victims explain in their merits brief, that conclusion is the only one consistent with the statute's plain text.

Amicus files this brief to emphasize that the contrary position advanced by Sudan would seriously undermine Congress's desire to broaden the availability of redress in cases like this one. And contrary to the assertion of Sudan, astonishingly endorsed by the United States, its position is not required to comply with international law or principles of reciprocity.

There is no rule of customary international law categorically barring mail service on an embassy, as demonstrated by the State Department's own regulations authorizing that method when "otherwise appropriate." 22 C.F.R. 93.1(c)(2). And applying the statute as written presents no risk to the reciprocity afforded to American embassies. Any nation is free to emulate the United States and refuse to accept mail service by instructing its embassy not to sign for registered mail.

The *Cole* Victims did exactly what 28 U.S.C. 1608(a)(3) requires; there is no basis to retroactively impose an additional hurdle and unwind eight years of litigation. This Court should affirm.

ARGUMENT

I. American military service members who are attacked while bravely facing the grave danger posed by state-sponsored terrorism deserve to hold nations like Sudan accountable in U.S. courts.

1. Members of the armed forces are the front line of America's defenses against terrorism. Indeed, the United States military is presently involved in counterterrorism operations in some 138 countries around the world. Niall McCarthy, *U.S. Special Operations Forces Deployed to 70% of the World's Countries in 2016*, Forbes (Feb. 7, 2017).[2] As a result, service members are often victims of terrorism themselves, as tragically illustrated by the *Cole* bombing. Despite that danger, they continue to serve bravely and with distinction, not for material gain, but for love of country and dedication to protecting all Americans.

In general, it is rare for military members injured in service to have legal recourse for the harm inflicted on them by enemies of the United States. Where Congress has provided for such redress, as through the state-sponsored terrorism exception to the FSIA, it is of the utmost importance that the courts adhere to Congressional intent and afford the remedies Congress has mandated.

Beginning in December 1979, the United States has maintained a list of foreign nations designated as state sponsors of terrorism. See 22 U.S.C. 2656f. A nation is designated a terror sponsor if it is "determined by the Secretary of State to have repeatedly provided support for actions of international terrorism." U.S. Dep't of State, *State Sponsors of Terrorism*, https://www.state.gov/j/ct/list/c14151.htm.

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[2] https://www.forbes.com/sites/niallmccarthy/2017/02/07/u-s-special-operations-forces-deployed-to-70-of-the-worlds-countries-in-2016-infographic/#2d30cfb57343.

In the almost 40 years since, only eight nations have ever been placed on the list: Syria, Iraq, Libya, South Yemen, Cuba, Iran, North Korea, and Sudan. At present, the list includes four nations, one of which is Sudan. *Ibid.* ("Currently there are four countries designated under these authorities: the Democratic People's Republic of Korea (North Korea), Iran, Sudan, and Syria."). Indeed, Sudan has been continuously listed as a terror sponsor for the past 25 years. See *ibid.*

2. Like many other service members and their families, the *Cole* Victims have suffered immeasurable harm as a result of Sudan's sponsorship of terrorism. Their rights were finally vindicated when they successfully used the FSIA to hold Sudan accountable for its role in the *Cole* bombing.

In this lawsuit, the *Cole* Victims provided sufficient evidence to persuade a federal district judge "that Sudan provided material support to Al Qaeda such that the terrorist organization could attack the Cole." JA 103. Specifically, the court found that "Sudan provided Bin Laden's fledgling terrorist group with a sanctuary," JA 97; that "Bin Laden established several joint business ventures with the Sudanese regime[,]" which "provided income to Al Qaeda, as well as cover for the procurement of explosives, weapons, and technical equipment, and for the travel of Al Qaeda operatives;" JA 97, and that "Sudan allowed its banking institutions to be used by Al Qaeda to launder money," JA 98.

The court also found that Sudan engaged in activities that provided organizational and logistical support to Al-Qaeda. JA 99-100. "Each year from 1997 to 2000, Sudan served as a meeting place, safe haven, and training hub for Al Qaeda and other terrorist groups. . . ." JA 99. And "Sudan provided Al Qaeda members with Sudanese diplo-

matic passports, diplomatic pouches, and regular Sudanese travel documentation that facilitated the movement of Al Qaeda operatives in and out of the country." JA 100.

Sudan now asks this Court to vacate the judgment that the *Cole* Victims spent years to obtain. Were this Court to accept the position of Sudan, the *Cole* Victims would be required to re-file their lawsuit and litigate the case from scratch. That is not only fundamentally inequitable, but also at odds with the manifest objective of Congress in amending the FSIA.

II. Congress unquestionably intended the FSIA to make terror sponsoring nations like Sudan accountable in U.S. courts to American victims.

1. In the lead-up to the original 1976 enactment of the FSIA, survivors of terrorism urged a "terrorist" exception to foreign sovereign immunity, to no avail. See *Price* v. *Socialist People's Libyan Arab Jamhariya*, 294 F.3d 82, 89 (D.C. Cir. 2002) (citing Alan Gerson & Jerry Adler, *The Price of Terror* at 212-26 (2001)). The political climate changed, however, after the horrific mass attacks on civilians of the 1980s and 1990s, often carried out with the help of foreign states.

For example, in December, 1988, agents of the Libyan government planted a bomb that destroyed Pan Am Flight 103 in mid-air over Lockerbie, Scotland, killing all 243 passengers and 16 crew (along with 11 more innocent people on the ground). *Lockerbie Bombing: Investigation Vow on Anniversary*, BBC News (Dec. 21, 2013), https://www.bbc.com/news/uk-scotland-south-scotland-25479717. The family members of those murdered on Pan Am 103 joined the voices of those lobbying Congress to hold terror states accountable and made a powerful impact. Ilana A. Drescher, *Seeking Justice for America's Forgotten Victims: Reforming the Foreign Sovereign Immunities Act*

Exception, 15 N.Y.U. J. Legis. & Pub. Pol'y 791, 821-22 (2012).

2. In 1996, Congress finally gave Americans harmed by these atrocities a means of redress. It enacted a terrorism exception to the FSIA allowing suits in federal courts against "countries responsible for terrorist acts where Americans and/or their loved ones suffer[ed] injury or death at the hands" of those nations or their officials. 239 H.R. Rep. No. 104-383, at 62 (1995); see former 28 U.S.C. 1605(a)(7).

Congress recognized the amendment was necessary because the problem had metastasized.

> State sponsors of terrorism consider terrorism a legitimate instrument of achieving their foreign policy goals. They have become better at hiding their material support for their surrogates, which includes the provision of safe havens, funding, training, supplying weaponry, medical assistance, false travel documentation, and the like. . . .

239 H.R. Rep. No. 104-383, at 62 (1995). By empowering victims to sue, Congress intended to "give American citizens an important economic and financial weapon against these outlaw states." *Ibid.*

The original exception was narrow. It withdrew sovereign immunity only in actions seeking money damages for personal injury or death resulting from specified acts of states or their officials. See former 28 U.S.C. 1605(a)(7). And it applied only to nations formally designated by the Secretary of State as terror sponsors.[3]

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[3] A non-listed state could, however, be sued for assisting in a terror attack that resulted in its designation as a state sponsor of terrorism. *Ibid.*; see also 50 App. U.S.C. 2405(j); 22 U.S.C. 2371(a).

Most limiting of all, the exception created no independent right of action. It operated as a "pass-through," conferring jurisdiction on federal courts to hear claims rooted in state law. *First Nat. City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620 (1983) (the FSIA "was not intended to affect the substantive law determining the liability of a foreign state or instrumentality") (citing H.R. Rep. No. 94-1487, at 12 (1976)); *Liu* v. *Republic of China*, 892 F.2d 1419, 1425 (9th Cir. 1989) ("The FSIA does not create a federal rule of liability to be applied in an action involving a foreign state").

3. Several months later, however, another horrific attack spurred Congress to further broaden the liability of terror states. The destruction of a passenger bus in Gaza—when an Iran-sponsored suicide bomber rammed it with a van full of explosives—led to passage of the Flatow Amendment. Joseph Keller, *The Flatow Amendment and State-Sponsored Terrorism*, 28 Seattle U. L. Rev. 1029, 1031 (2005). Named for an American student who perished in the bombing, the Amendment allowed non-economic damages (including pain and suffering and solatium), and punitive damages against state sponsors of terror. Flatow Amendment, Pub. L. No. 104-208, § 589, 110 Stat. 3009-172 (1996) (codified at 28 U.S.C. 1605).

Some courts initially construed the Flatow Amendment to establish a cause of action, based on language authorizing suit if a U.S. government official would be liable for the same acts. *Cronin* v. *Islamic Republic of Iran*, 238 F. Supp. 2d 222, 231 (D.D.C. 2002); *Regier* v. *Islamic Republic of Iran*, 281 F. Supp. 2d 87, 98-99 (D.D.C. 2003) (following *Cronin*); *Kilburn* v. *Republic of Iran*, 277 F. Supp. 2d 24, 36-37 (D.D.C. 2003) (same). But in 2004, the District of Columbia Circuit held that neither the Flatow Amendment nor any other part of the FSIA provided an independent right to sue a foreign government. *Cicippio-*

Puleo v. *Islamic Republic of Iran*, 353 F.3d 1024, 1033 (D.C. Cir. 2004).

4. In 2008, Congress stepped in to unequivocally grant a private right of action against state sponsors of terrorism. 28 U.S.C. 1605A(c). The new statute also extended damages to foreseeable property losses, and facilitated enforcement of judgments by allowing attachment of defendants' property at the outset of litigation. *Id.* § 1605A(d), (g). Congress made clear its intent to afford terror victims full recompense for their injuries through civil remedies against the sponsoring states.

III. Having failed to convince courts that the FSIA's terrorism exception violates U.S. and international law, Sudan now asks this Court to gut the exception by misreading the statute's procedural rules.

Sudan and other designated terror states have repeatedly attempted to convince U.S. courts that the FSIA's state-sponsored terrorism exception is unconstitutional and/or violates international law. See, *e.g.*, *Owens* v. *Republic of Sudan*, 531 F.3d 884, 893 (D.C. Cir. 2008) (rejecting Sudan's argument that statutory terms "repeatedly," "support," and "acts of international terrorism" are unconstitutionally vague); *Wyatt* v. *Syrian Arab Republic*, 266 F. App'x 1, 2 (D.C. Cir. 2008) (provision authorizing designation of state sponsors of terrorism does not violate international law); *Simon* v. *Republic of Iraq*, 529 F.3d 1187, 1197 (D.C. Cir. 2008), *rev'd sub nom Republic of Iraq* v. *Beaty*, 556 U.S. 848 (2009) (suits under FSIA's terrorism exception do not present non-justiciable political question); *Gates* v. *Syrian Arab Republic*, 646 F. Supp. 2d 79 (D.D.C. 2009) (suits under terrorism exception do not present non-justiciable political question, violate the U.N. Charter by treating sovereign states unequally, or violate the separation of powers); *Wultz* v. *Islamic Republic of Iran*, No. 08-cv-1460 (RCL), 2010 WL 4190277, at *3

(D.D.C. Oct. 20, 2010) (same); *Wyatt* v. *Syrian Arab Republic*, 736 F. Supp. 2d 106, 113 (D.D.C. 2010) (rejecting separation-of-powers challenge to terrorism exception as not properly directed to judicial action but only to subsequent executive or legislative action to reopen judgment).

Having failed in their substantive challenges, they are now asking the courts to gut the state-sponsored terrorism exception by erecting a procedural hurdle Congress clearly did not intend to impose. The Second Circuit correctly declined the invitation, as should this Court.

1. To affirm the Second Circuit, this Court need look no further than the plain language of 28 U.S.C. 1608(a)(3). As clearly explained by the *Cole* Victims in their brief, the decision below adopted the only faithful reading of the relevant statutory text.

Amicus will not repeat those arguments here. The simple fact is, the *Cole* Victims followed the FSIA's service provision to the letter. It would be profoundly unfair to deny them relief for failing to comply with a requirement not found in the statute and never announced by any court until seven years after service was made. See *Kumar* v. *Republic of Sudan*, 880 F.3d 144 (4th Cir. 2018).

If required to return to square one, the *Cole* Victims will face formidable challenges. In the *Kumar* litigation, other *Cole* victims have, since the issuance of Fourth Circuit's order, already expended eight months attempting to serve Sudan at its foreign ministry in Khartoum under the provisions of 28 U.S.C. 1608(a)(3) (the signed return receipt was never returned) and then under 28 U.S.C. 1608(a)(4). *Kumar* v. *Republic of Sudan*, No. 2:10-cv-00171-RGD-TEM (E.D. Va. Sept. 12, 2018), ECF No. 213 at 1-5. The district court has repeatedly enlarged the time to perfect service. *Ibid.* Yet no end of Sudan's delays is in sight. In the meantime, the *Kumar* plaintiffs have paid

nearly $40,000 in additional fees to the State Department to serve process under subsection (a)(4). *Id.* at 4.

That level of administrative expense is a non-trivial obstacle when the prospects for ultimately collecting any judgment are highly uncertain and necessarily will involve years of delay. The *Cole* Victims commenced this litigation eight years ago, secured a default judgment six and a half years ago, and have yet to see a penny of relief. JA 1, 8. Despite its awareness of this suit and post-service meeting with an attorney for the *Cole* Victims, Sudan chose not to appear in the case until after turnover orders had issued against its assets—more than three years after the litigation began. JA 88, 172, 174; C.A. Dkt. 104, Ex. A, ¶¶ 2-4. Even if service could be effectuated sometime in the future, repeating substantive proceedings in the district court would add years of further delay.

2. In support of its atextual reading of 28 U.S.C. 1608(a)(3), Sudan advances two baseless arguments—neither of which is grounded in the statute's plain language, and both of which are endorsed in this Court by Libya, Saudi Arabia, the United Arab Emirates, and Austria. Of course, "the positions of that select group of nations are hardly surprising, because each of those nations faces the threat of significant litigation in the United States for involvement either in the Holocaust or in more recent acts of terrorism." Red Br. 45 n. 14 (citations omitted).

What is surprising, however, is the fact that the United States has filed a brief in support of Sudan. It is shocking and deeply dismaying that our government would stand with the nation that facilitated the *Cole* bombing, and against the surviving American sailors and their families—and that it would do so employing arguments that contradict the FSIA's plain language. In any event, both of the arguments endorsed by the United States are wrong:

a. First, the United States agrees with Sudan that *any* service of a summons and complaint on a foreign state's embassy in the U.S. would be a violation of international law; specifically the "mission inviolability" principle. U.S. Br. 20-24. But it is hard to understand how the United States can seriously advocate such a position when the State Department—as expressly authorized by its own regulations—has itself served private lawsuits against foreign states via mailing to their Washington, D.C. embassies since the FSIA was enacted.

Those regulations permit the relevant State Department employee to obtain from the clerk of court "the required copies of the notice of suit and of the summons and complaint . . . and any required translations," 22 C.F.R. 93.1(b), and "promptly cause one copy of each such document and translation . . . to be delivered . . . [i]f the foreign state so requests *or if otherwise appropriate* to the embassy of the foreign state in the District of Columbia," 22 C.F.R. 93.1(c)(2) (emphasis added).

From the inception of the FSIA, the State Department has found it "otherwise appropriate" to serve the embassies of foreign states in Washington, D.C. See, *e.g.*, *Jackson* v. *People's Republic of China*, 550 F. Supp. 869, 873 (N.D. Ala. 1982) (State Department served the embassy of China in Washington, D.C., and service was effective despite embassy's subsequent return of the documents to the Department); *Int'l Ass'n of Machinists & Aerospace Workers* v. *OPEC*, 477 F. Supp. 553, 560 (C.D. Cal. 1979) (Department served the embassies of Algeria and Qatar in Washington, D.C.); *Tomanek* v. *Phil.*, Civ. No. 505885-5 (Cal. Super. Ct., March 20, 1978) (Department served the Embassy of the Philippines in Washington, D.C.).

To be clear, 22 C.F.R. 93.1 does not constitute a diplomatic exception to a general principle against mail service

on embassies. The regulation requires the State Department to include a note warning the foreign state that "under United States law, questions of jurisdiction and of state immunity must be addressed to the court and not to the Department of State" and that "it is advisable to consult with an attorney in the United States." 22 C.F.R. 93.1(d). Thus, State Department transmittal expressly disclaims diplomatic discretion over U.S. court proceedings and enables the enforcement of domestic law.

This purpose squarely contradicts the "duty to abstain from exercising any sovereign rights, in particular law enforcement rights" that, in the view of the United States, lies at the heart of "mission inviolability." U.S. Br. 21 (citing Eileen Denza, *Diplomatic Law* 110 (4th ed. 2016)). That the State Department nonetheless authorizes this method of service demonstrates that mail delivery must not constitute a violation of sovereign premises—which comports with common sense: embassies receive mail as a routine matter. Sudan objects not to the *act* of mail delivery—as it would to the entry of a process server or law enforcement official into embassy grounds—but to the contents of the mail at issue.[4]

In sum, if the State Department genuinely believed that mail service upon an embassy were a breach of the mission inviolability principle, it would not engage in the practice at all. Accordingly, this purported principle of international law cannot be used to interpret into existence a requirement not present in the text. The government's

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[4] Every service packet under 28 U.S.C. 1608(a)(3) must include a Notice of Suit explaining the nature of the suit, the relief sought, and the foreign state's obligation to respond under domestic law. 22 C.F.R. 93.2(a), Annex, items 4-5, 7-9. There is thus no reason to view mail service on an embassy as any less permissible under subsection (a)(3) than under subsection (a)(4).

attempt to do so—at the expense of our nation's veterans—is as disappointing as it is incorrect.

b. Second, the United States argues that affirming the decision below would undermine its attempts to obtain reciprocal respect for U.S. embassies abroad. But as the *Cole* Victims explain, the United States does not accept process in *any* manner contemplated by Section 1608(a)(3). In other words, it is true that the United States will not accept mail service via any of its embassies abroad. Department of Justice, *Service of Process on the United States Government* (Nov. 4, 2016), https://www.justice.gov/civil/page/file/1036571/download. But it is *also true* that the United States will not accept mail service via the State Department (i.e., our "foreign ministry") in Washington, D.C. *Ibid.*

The upshot is quite simple: The Second Circuit is correct that a nation's right to avoid 28 U.S.C. 1608(a)(3) service by refusing to sign for registered mail satisfies any concerns about comity and reciprocity. Just as Sudan has refused to sign and accept service of process by *Cole* victims at its foreign ministry in Khartoum, it could have refused to accept service at its U.S. embassy—rather than accept service and meet with a lawyer for the *Cole* Victims. JA 88, 172; C.A. Dkt. 104, Ex. A, ¶¶ 2-4.

But if the Second Circuit was wrong, then *any interpretation* of Section 1608(a)(3) that allows service to be made—including the one offered by Sudan and the United States—would constitute an affront to comity and threaten reciprocal treatment of America abroad.

Put simply, Sudan and the U.S. have a problem with the statute drafted by Congress—not with its faithful application by the Second Circuit.

CONCLUSION

The United States government's willingness to disregard the needs of injured service members and the families of dead veterans is a profound disappointment. Service members and their families are more than willing to set aside their own personal welfare for the needs of the country. But there is no reason they should be required to do so here. The decision below should be affirmed.

Respectfully submitted.

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